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IN THE

Supreme Court of the United States

October Term, 1956.

No. 6.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, and FRANK CARLSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the Court of Appeals [Clk. R. 105] is reported at 225 F. 2d 146. The written opinions of the District Court are reported in 102 F. Supp. 87; 104 F. Supp. 405; 106 F. Supp. 731; 106 F. Supp. 892; 106 F. Supp. 906. These opinions are contained in the Appendix herein (Cert. App. B, pp. 48-145).[1]

[1]The reference Cert. App. is to the "Appendices to Petitions for Writs of Certiorari" which are bound together in a single volume with the pages numbered consecutively; Appendix B, for example, appears at pages 48-145 of said volume of Appendices. The clerk's

Jurisdiction.

The judgment of the Court of Appeals is dated March 17, 1955, and was entered on the same day. The time of petitioners to file petition for rehearing was by order of the Court of Appeals extended to May 16, 1955. A petition for rehearing was duly filed on May 13, 1955, and an order made and entered on June 15, 1955, denying the said petition for rehearing [Clk. R. 140]. On the 27th day of June, 1955, the time for filing petitions for writ of certiorari herein was extended to and including August 13, 1955, by order of Mr. Justice Frankfurter. The petition for certiorari was granted on October 17, 1955 [Clk. R. 141]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Statutes Involved.

The pertinent provisions of the statutes involved: 18 U. S. C. (1946 Ed.), Sections 10, 11; 18 U. S. C. (1948 Ed.), Sections 371, 2385; 50 U. S. C., Section 783(f); and the constitutional provisions involved: First, Fifth and Sixth Amendments, are set forth in the Appendix to the brief herein.

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transcript printed herein will be referred to as "Clk. R."; the Reporter's transcript as "R."; the printed "Appendix to Appellee's Brief" as "GA"; and the "Appendix to Appellants' Brief" as "App. Item." The last mentioned Appendix is made up of numbered items, and the number of the item referred to as well as the pages of the appendix at which it is found will be indicated in each instance. The original exhibits on file here will be referred to as "Ex." Both the "Appendix to Appellee's Brief," "GA" and the "Appendix to Appellants' Brief," "App. Item" contain selected portions of the Reporter's transcript and Exhibits. In each instance, the Reporter's transcript reference and the exhibit number of the material incorporated in the appendix precedes the appendix reference. However, in most instances the reference to the original source will be more extended and comprehensive than the portion thereof included in the appendix. The appendices were submitted by the parties below as setting forth the parts of the record which the parties specially desired to direct to the attention of the Court of Appeals.

Questions Presented.

1. Whether the holdings of the courts below—that the evidence as to each of the petitioners and the nature of his activities were sufficient to establish the conspiracy alleged in the indictment, his connection with the conspiracy, his specific intent to forcibly overthrow the Government as speedily as circumstances permit and his power to bring about an attempt at such overthrow, and to sustain the conviction—were contrary to law and violated the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

2. Whether the holdings of the courts below—that proof of the advocacy and teaching of the doctrines of Marxism-Leninism by the Communist Party together with proof as to each of the petitioners of membership and the holding of office in the Party and participation in lawful activities therein were sufficient to sustain a conviction under the instant indictment—established standards of proof contrary to law, including the provisions of 50 U. S. C., Section 783(f), the provisions of the First Amendment, and the due process provisions of the Fifth Amendment.

3. Whether the holdings of the courts below which permitted the jury to draw inferences of a criminal intent to further and effect the objects of the conspiracy alleged in the indictment solely from nonculpable speech, press and assembly, or from allegations of overt acts not supported by any evidence, were contrary to law and constituted an erroneous construction of the "overt acts" provisions of 18 U. S. C., Section 371 as applied with 18 U. S. C., Section 2385 to the prosecution of the instant indictment, and were in violation of the provisions of the

First Amendment and the due process provisions of the Fifth Amendment.

4. Whether the refusal of the trial judge, sustained by the Court of Appeals, to give any instructions to the jury to the effect that the law punishes only advocacy and teaching of the forcible overthrow of the Government by language reasonably and ordinarily calculated to incite persons to action with intent that such teaching and advocacy be of a rule or principle of action resulted in an erroneous construction and application of 18 U. S. C., Sections 371 and 2385 and violation of the provisions of the First Amendment.

5. Whether the courts below erroneously applied 18 U. S. C., Sections 371 and 2385 to these petitioners in violation of the provisions of the First Amendment insofar as the clear and present danger rule is concerned by, separately or in their totality: refusing to submit the question of incitement to the jury for their determination; refusing any judicial evaluation at the trial of the evidence on the question of the nature of petitioners' activities or their power to bring about an attempt to forcibly overthrow the Government; and by equating clear and present danger solely with the intent, of an advocate or teacher of the proscribed doctrine, to forcibly overthrow the Government as speedily as circumstances would permit.

6. Whether the holding of the Court of Appeals sustaining the refusal of the trial judge to instruct the jury as requested by the petitioners that the testimony of wit-

nesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

7. Whether the construction of the word "organize" in 18 U. S. C., Section 2385 by the courts below to include "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization," and the application of the statute as construed to these petitioners, were contrary to law and in violation of the provisions of the First Amendment and the due process provisions of the Fifth Amendment.

8. Whether the holding of the Court of Appeals sustaining the rulings of the trial judge in refusing to grant a continuance of the trial at its commencement upon the serialized publication of the "Philbrick Story" and in refusing to grant the motion for mistrial upon the publication of the "F. B. I. Report" at the eve of the submission of the case to the jury deprived petitioners of a fair and impartial trial without due process of law in violation of the provisions of the Fifth and Sixth Amendments.

Statement of the Case.

Introduction.

One of the most important issues in this proceeding is the sufficiency of the evidence to support the judgments of conviction. The trial was a lengthy one, made so by the use of the conspiracy weapon to encompass fourteen persons in one trial and by the theory of the prosecution. Respondent, for proof of petitioners' guilt, relied on a series of inferences to establish the conspiracy, petitioners' connection therewith, and the requisite specific criminal intent of each of the accused. Respondent's contention was that the Communist Party's advocacy and teaching of the "principles of Marxism-Leninism" was inferentially equivalent to the advocacy and teaching of the forcible overthrow of the Government which advocacy was imputable to petitioners by virtue of their membership and officership in the Party. The trial was thus inordinately burdened with readings from various portions of Marxist literature.

In order for this Court properly to appraise the evidence and to do justice both to the accused and the prosecution, petitioners set forth in the Appendices to the Petition for Certiorari all the evidence relating specifically to each petitioner upon which the prosecution itself relied as set forth in respondent's brief below [Cert. App. C, 146-83] and an analysis of said evidence in a chart [Cert. App. C, 188-99] which presented cryptically any evidence which purportedly established each petitioner's adherence to the doctrines of Marxism-Leninism or of revolution.

The Statement of the Case which follows, while perhaps longer than the usual one, actually is intended to expedite consideration by this Court of the entire case

affecting each of the petitioners, without omitting any essential aspect of the evidence. Petitioners' position is: that although the prosecution's view is that the "principles of Marxism-Leninism" demand the overthrow of the Government of the United States by force and violence, at least one tenable conclusion from the record in this case is that these concepts call for the winning of majority support in order to seek the achievement of revolutionary changes through peaceful means; that as to each of the accused there was no substantial evidence—in most cases not even a scintilla of evidence—to warrant a finding that he adopted a reprehensible interpretation of these principles or that he specifically intended to forcibly overthrow the Government as speedily as circumstances permit; that—unless a presumption of innocence is to be substituted for the presumption of guilt—the uncontradicted evidence is consistent only with a permissible and lawful interpretation by petitioners of these doctrines, and that the trial court erred in submitting the case to the jury rather than granting petitioners' motions for judgments of acquittal.

The Indictments.

Petitioners Dorothy Healey Connelly, Albert Jason Lima, Oleta O'Connor Yates, Carl Rude Lambert, Rose Chernin Kusnitz, Ernest Otto Fox, Henry Steinberg, Loretta Starvus Stack and co-petitioners William Schneiderman, Philip Marshall Connelly and Al Richmond were arrested on a commissioner's warrant on July 26, 1951, and indicted on July 31, 1951.[2] It was charged that the

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[2]Also indicted at the same time was Mary Bernadette Doyle. However, she was severed from the case because of ill health on April 24, 1952 [R. 5885-7].

defendants named in the indictment conspired with each other and with "co-conspirators" (not named as defendants) William Z. Foster, Eugene Dennis and the other defendants in the *Dennis* case,[3] and with persons unknown to violate Section 2 of the Smith Act (54 Stat. 671, 18 U. S. C. (1946 Ed.) 10, and 18 U. S. C. (1948 Ed.) 2385) by conspiring "(1) unlawfully, wilfully, and knowingly to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence and (2) unlawfully, wilfully and knowingly to organize and help organize as the Communist Party of the United States of America, a society, group, and assembly of persons to teach and advocate the overthrow and destruction of the Government of the United States by force and violence, in violation of Section 3 of the Smith Act, 54 Stat. 671, 18 U. S. C. (1946 Ed.) 11, and 18 U. S. C. (1948 Ed.) 371." It was further alleged that as part of said conspiracy the conspirators would become members, officers and functionaries of the Communist Party knowing its purposes; assume leadership therein and responsibility for carrying out its policies and activities; cause to be organized groups and various subdivisions of the Party in the State of California and elsewhere; engage in recruiting activities with concentration in the key basic industries and plants; participate in the publication and circulation of books, articles, magazines and newspapers teaching and advocating the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; cause to be written directives in various publications of the Communist Party including *Political Affairs* and the

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[3]See *Dennis v. United States*, 341 U. S. 494.

Daily People's World, teaching and advocating the necessity of overthrowing and destroying the Government of the United States by force and violence; "conduct and cause to be conducted schools and classes for indoctrination of recruits and members of said party in the principles of Marxism-Leninism in which would be taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence as speedily as circumstances permit"; make and effect plans "to go underground in the event of emergency and from said underground position to continue in all respects the conspiracy"; use various methods including fraudulent passports and other false documents in order to conceal their identities and activities within the conspiracy. The indictment then alleged fifteen overt acts, the first of which is alleged to have occurred on July 17 and 18, 1948, and the last on July 24, 1951. Each of the overt acts consisted either of participation in a meeting or the issuance of a directive and its circulation in the Communist Party. In no instance was the content of the meeting or of the directive mentioned in the indictment [Clk. R. 1].

On August 31, 1951, petitioners Frank Efroim Spector, Ben Dobbs and Frank Carlson were arrested and on September 5, 1951, they were indicted on a charge identical with that alleged in the first indictment.[4]

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[4]Petitioners and their co-defendants were denied reasonable bail by the trial court. After 4½ months during which there were numerous proceedings in the trial court and the Court of Appeals and one case decided by this Court, the petitioners finally secured their release on bail. (*Stack v. Boyle,* 342 U. S. 1; *Stack v. Boyle,* 192 F. 2d 56; *United States v. Schneiderman,* 102 F. Supp. 52; *United States v. Spector,* 102 F. Supp. 75; *Stack v. United States,* 192 F. 2d 75; *Spector v. United States,* 192 F. 2d 1002.)

On motions to dismiss the two original indictments the District Court in a written opinion held that it was necessary to plead specific "intent to overthrow the Government of the United States by force and violence" and ordered the dismissal of the indictment on this ground. (*United States v. Schneiderman,* 102 F. Supp. 87; Cert. App. B, p. 48 *et seq.*)[5]

A new and single indictment against all of the defendants named in the first two indictments was returned on December 21, 1951. The new indictment was substantially identical with the first two, except for the following:

First, instead of charging as did the first indictment that the conspiracy began in April of 1945 (the date when the Communist Political Association was dissolved and the Communist Party was reconstituted), the new indictment alleged that the conspiracy began on or about June 28, 1940 (the date of the enactment of the Smith Act).

Second, it was charged that the defendants conspired in the particulars set forth in the first two indictments "with the intent of causing the said overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

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[5]Appended to the opinion is a comparison of the indictments in the instant case with that in *Dennis v. United States,* 341 U. S. 494 (Cert. App. B, 68-76). It should be noted that paragraphs 2 to 6 inclusive of *Dennis* indictment have no counterpart here (pp. 69-71). These paragraphs alleged that the *Dennis* defendants, as part of the conspiracy charged, brought about the dissolution of the Communist Political Association and organized the Communist Party as an instrument for engaging in advocacy of violent overthrow of the Government.

Third, 23 overt acts were alleged instead of the 15 set forth in the original two indictments and the overt acts covered the period from January 31, 1941 to July 24, 1951, instead of from July 17 and 18, 1948, to July 24, 1951. The overt acts charged were of the same character in both indictments [Clk. R. 14, 19-24].

Defendants' motion to dismiss the second indictment was denied [Clk. R. 61]. Included in the grounds urged on the motion to dismiss the first two, as well as the last indictment, was the objection that the indictment failed to allege facts showing a clear and present danger sufficient to justify an application of the Smith Act to the defendants. This objection was overruled upon the basis, first, that the charge of teaching and advocacy with the intent to bring about ultimately the overthrow of the Government by force and violence adequately alleged a "clear" danger; second, that the allegation of the specific intent to accomplish the object of forcible overthrow as speedily as possible sufficiently set forth a "present" danger (see opinion of trial court 102 F. Supp. 87, 95-6; Cert. App. B, pp. 48, 64-5). This view of the law was adhered to by the District Court throughout the trial and on motion for judgment of acquittal (see opinion of trial court 106 F. Supp. 906, 923; Cert. App. B, pp. 128, 135-6).

In the motion to dismiss the last indictment the objection was raised that the portion of the indictment dealing with the charge of organizing and helping to organize, as the Communist Party of the United States of America, a society of persons to engage in the proscribed advocacy was barred by the statute of limitations and that it was vague and indefinite [Clk. R, 6, 7, 8]. In supporting affidavits it was shown that the respondent had admitted

in the *Dennis* case that the Communist Party of the United States was organized at a convention in New York City held from July 26-28, 1945, and later in *Stack v. Boyle, supra,* 342 U. S. 1, had asserted in this case that the defendants were charged with participating "in the same Communist conspiracy which was found to exist in *Dennis v. United States* . . ."; had insisted at all stages of the *Dennis* case that the dissolution of the Communist Party in 1944 and the creation of the Communist Political Association was "something fundamental . . . an abandonment by Communists in the United States of an objective, the doctrines and the program which they advocated ever since their founding"; and that in 1945 when the Communist Political Association was dissolved the Communist Party was organized pursuant to a conspiracy to advocate and teach the forcible overthrow of our Government. It was urged by defendants that the organization of the Communist Party having been completed in 1945 the statute of limitations began to run at that time and that the organizing charge was barred by the lapse of time [Clk. R. 9]. In the light of the inconsistencies in the position of the United States, defendants sought by motion for bill of particulars to elicit information concerning the Government's position as to when the conspiracy began and as to whether the alleged conspiracy to organize as aforesaid was ever consummated [Clk. R. 32; App. Item 3, p. 81]. Both the motion to dismiss and that for the bill of particulars were denied without opinion [Clk. R. 61-2].

At the trial evidence was introduced relating directly to individual petitioners as follows:

Oleta O'Connor Yates.

Petitioner Yates was the only petitioner who testified. The record as to her beliefs and her activities is comprehensive and detailed.

1. PETITIONER'S REASONS FOR JOINING THE COMMUNIST PARTY.

She was born in San Francisco in 1910. Her parents were working people with a family tradition of trade unionism [R. 10,159-62][6]. She is a graduate of the College of Notre Dame in San Francisco (a grammar school), Girls High School and the University of California at Berkeley with a Bachelor of Arts and Master of Arts degrees [R. 10,162-4, 10,204]. Because of her family's financial condition, she largely worked her own way through college [R. 10,165-6]. While in college she became interested in economics, and concluded that her college courses did not satisfactorily explain the condition of the country as she found it then, in 1931 [R. 10,168-74]. As a consequence she branched out in her reading to such works as Moore's "Utopia," Bellamy's "Looking Backward," George Bernard Shaw's "Intelligent Woman's Guide to Socialism" and, finally, the works of Marx and Engels [R. 10,174-6]. In the latter writings, she found for the first time what appeared to her to be a reasonable explanation of the world around her—particularly of unemployment and widespread economic hardship in the light of the existing ability to produce enough for all [R. 10,176-9; App. Item 84, pp. 343-4].

About this time, petitioner began to attend meetings and participate in the activities of the unemployed and of co-operative organizations [R. 10,179-80].

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[6]Evidence concerning petitioner's background and the development of her views was admitted on the issue of intent.

As a result of her reading and activities petitioner became convinced that only through their ownership of the means of production in a society in which individuals would contribute to production according to their ability and receive compensation according to their work could the people satisfactorily solve their economic problems [R. 10,195-96]. As a result of her conclusions she joined the Socialist Party in 1932 [R. 10,198-200] and became active as an election campaigner [R. 10,206-8].

Petitioner became dissatisfied with the program of the Socialist Party because it did not concern itself with the day to day problems of the people except through the solution of socialism which she did not consider as an immediate answer [R. 10,210-2; App. Item 85, pp. 344-5]. During this period she came into contact with the work of the Communist Party, and observed that it was conducting campaigns on day to day problems, including particularly the organization of agricultural workers, and improvement of their wretched conditions [R. 10,212-13; App. Item 86, pp. 345-6]. It appeared to her that the Communists were using legal and peaceful means in their efforts to this end but were met by violence at every turn [R. 10,213-36]. She was particularly impressed by the position of the Communist Party that it was possible within the framework of the existing social order to improve the conditions of the people through securing higher wages, unemployment insurance, more adequate relief and similar measures, and that "the immediate task was to fight to improve the day-to-day conditions of the people as a step toward building the kind of movement that would ultimately lead to socialism" [R. 10,241-2].

Petitioner left the Socialist Party in early 1934 when it turned down a proposal for unity, presented by the

Communist Party, around such issues as freedom for Tom Mooney, aid to agricultural workers, and an improved relief system. In September of 1933 she joined the Communist Party while she was still a member of the Socialist Party in the hope that unity would be achieved [R. 10,243-53; App. Item 87, pp. 346-7].

Petitioner entered the Communist Party at a time when the right of Socialists and Communists to compete in the arena of public opinion was given practical recognition. Thus in 1932 Marxism was taught by a Socialist as part of a regular college course in the university she attended, and petitioner was allowed to speak on the Berkeley campus of that University in support of socialism on one occasion and the candidacy on the Communist Party ticket of William Z. Foster for President of the United States on another occasion [R. 10,266-71].

From 1935 to 1943 petitioner held various offices including that of organizer and Educational Director in the San Francisco County Party organization and for a period was a member of the District Committee for District 13, which at that time embraced the Pacific Coast area; she was also a delegate to the 1945 State Convention [R. 455-8; Ex. 546; R. 4552]. From 1944 to 1950 she was San Francisco County Chairman [Ex. 563, R. 4513; GA 448; Ex. 565, R. 4511, GA 448; Ex. 583, R. 4515, GA 449; Ex. 560, R. 4513, GA 448; R. 10,353, GA 378].[7]

In 1950 she became and was at the time of trial the Party's California State Organizational Secretary, and

[7]For a year during 1944 and 1945 the Communist Party was out of existence and the Communist Political Association supplanted it. During that period, the activities and positions held by this and other petitioners were in the Association.

she was a member of the California State Committee [R. 11,228; R. 11,624, GA 418; Ex. 538, R. 4587, GA 459]. Her duties consisted of the organization of Party recruiting drives, checking on dues payments, and assisting various subdivisions of the Party to organize mass campaigns of various kinds such as for peace and civil rights [R. 11,228-31, GA 393-4].

2. PETITIONER'S UNDERSTANDING OF THE GENERAL PROGRAM OF THE PARTY AND THE GENERAL PRINCIPLES OF MARXISM-LENINISM.

The petitioner asserted her adherence to the Communist Party and to the doctrines of Marxism-Leninism as she understood them. She testified at great length concerning her construction of the theories of that body of thought and its application to the United States. She testified as follows:

Her adherence to the Communist Party and to Marxism-Leninism is predicated in part on her belief that Marxists have made important contributions to the democratic development of the United States.[8] As she understands it, that movement played a substantial part in the initiation and growth of the trade union movement; from the beginning it urged complete equality for all regardless of race, color or sex; it contributed substantially to the fight against slavery; it supported the Union in the Civil War; it was in the forefront of the fights for numerous objectives, which are either accomplished facts or stated aims of government today, such as women suffrage, the

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[8]Petitioner's understanding was based largely on non-Marxist sources, such as "A History of the Labor Movement in California" by Ira B. Cross [Ex. JD, R. 10-257-9].

public school system, the abolition of child labor, the establishment of Negro rights and the election of candidates for public office pledged to such objectives [Ex. JD, R. 10,257; Ex. BJ (sometimes referred to as Ex. JE), R. 2975; Ex. MC, R. 11,020; R. 10,965-80, 11,016-22, 11,042-3, 10,256-7; App. Items 5-8, pp. 83-6].

According to her understanding of the principles of Marxism-Leninism, to which she adheres, society has gone through several stages, from primitive communism to slavery, then to feudalism, and then to capitalism; each stage has been an advance over the one that preceded it; socialism is the next stage, to be followed by communism and beyond that it is not possible to see; each successive stage has resulted and will result in more production and greater freedom [R. 10,406-13]. As she sees it, each transition took place because the productive forces of society reached a stage where they could no longer expand under the existing productive relations maintained by the existing form of the state, and not because some individuals willed the change; while ideas can help further the process of social change, neither they nor their advocacy cause it [R. 10,417-19, 10,672-5].

Her position is that the ultimate goal of the Communist Party, in furtherance of the social process which demands change, is to replace the capitalist system by one in which the means of production are owned by the people and are used to produce for the people, not for profit; and that the achievement of power by a government which will undertake and accomplish the overthrow of the existing social system can be accomplished by the ballot box and without violence [R. 10,442-3].

Petitioner's understanding is that Marxism-Leninism conceives of the state as an instrumentality to protect the interests of the dominant or "ruling" class—the owners of the means of production,—the slaveowners at one time, the feudal lords later, and the capitalists today, with each form of the state basing its power on the coercive effect of violence or the threat thereof [R. 10,525-6]; from this standpoint every state is a dictatorship in basic content—a means by which the "ruling class" rules — no matter how democratic it is in form; thus viewed the Government of the United States is a "dictatorship of the bourgeoisie" and that of any socialist government is a "dictatorship of the proletariat"; the democratic processes functioning within a capitalist state may provide a vehicle for the improvement of the conditions of the people, just as a union may be used to improve the conditions of workers, without changing the control of the state any more than the ownership of the factory is transferred by the bargaining of a union [R. 10,533-5].[9]

It does not follow, according to her understanding, that Marxists are indifferent toward "bourgeois democracy"; they regard it as "an essential aspect of the education for eventual achievement of a socialist society, with the greater democracy that it would afford to the masses of people" [R. 10,552-5]; fascism is the other existing form of capitalist state and Marxists consider it their duty to fight for "bourgeois democracy" against fascism; as long as democratic processes are operative and fascism is stopped "there is no need for fearing

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[9]One of respondent's witnesses testified that this was what he taught as a member of the Party [R. 1043, 1049, App. Item 56, pp. 226-7; R. 1050-3, 1077-8, 1085-7, App. Item 58, pp. 233-8).

strife or violence in the effecting of social change"; what the people in the United States want today is more democracy; and socialism is not and cannot become an immediate issue "until the majority are convinced of its necessity" [R. 10,563-77, App. Item 90, pp. 349-50 and App. Item 91, p. 350; R. 10,731-4].

She expressed her understanding that the dictatorship of the proletariat means the rule of a class—the working class—when for the first time the owning and dominant class is made up of the great majority of the people [R. 10,627-9];[10] the socialist state is primarily concerned with the needs and wishes of this overwhelming majority, without the support of which the dictatorship of the proletariat can neither be established nor maintained [R. 10,937-40]; the form of the dictatorship of the proletariat will differ in different countries just as does the form of the "dictatorship of the bourgeoisie" [Ex. 11, R. 10,874-5, App. Item 59, p. 238], but in any event it will be more democratic than the particular capitalist state which precedes it [R. 10,816-20].

It is further petitioner's understanding that the socialist state will substitute its own laws and political machinery for those of the previous form of state; this substitution

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[10] *Cf.* the following language from Lenin's "State and Revolution" Ex. 606: "The state is an instrument in the hands of the ruling class for suppressing the resistance of its class enemies. In this respect the dictatorship of the proletariat in no way differs, in essence, from the dictatorship of any other class, for the proletarian state is an instrument for the suppression of the bourgeoisie. Nevertheless, there is an essential difference between the two, which is, that all class states that have existed heretofore have been dictatorships of an exploiting minority over the exploited majority, whereas the dictatorship of the proletariat is the dictatorship of the exploited majority over an exploiting minority" [R. 11,804].

which involves the elimination of old laws and state apparatus is often referred to as "smashing the bourgeois state"; this refers not to the use of physical force but rather to such things as the abolition of old agencies to make way for the new;[11] the phrase referred to is used in order to emphasize the necessity for changes of the most complete and fundamental character;[12] the specific character of the changes in the United States cannot be predicted; they will vary from nation to nation according to the past background, level of industrial development, literacy of the population and numerous other conditions in each land [R. 10,881-908]; this new state is called the "dictatorship of the proletariat," as that term is used in a Marxist-Leninist sense, regardless of the precise form it takes. Petitioner agrees with the analysis of this term in the *Schneiderman* case: "The concept of the dictatorship of the proletariat is one loosely used, upon which more words than light have been shed. Much argument has been directed as to how it is to be achieved, but we have been offered no precise definition here. In

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[11] *Cf.* the language of Lenin in "The April Conference": ". . . Among Bolsheviks, I have compared this state to the Paris Commune in the sense that the latter had destroyed the old administrative organs and had replaced them by perfectly new ones that were direct and immediate organs of the workers. I am blamed for using a word now exceedingly frightening to the capitalists, for they have begun to interpret it as a desire for the immediate introduction of socialism. I have used it, however, only in the sense of replacing old organs by new proletarian organs." [Ex. 497, R. 12,105-7, App. Item 65, pp. 253-4].

[12] Note the following language quoted by petitioner from "The Paris Commune" by Lenin [Ex. 492, p. 31, R. 4408]: "Thus the Commune would appear to have replaced the shattered state machinery 'only' by fuller democracy, abolition of the standing army; all officials to be fully elective and subject to recall. But, as a matter of fact this 'only' signified a gigantic replacement of one type of institution by others of a fundamentally different order" [R. 10,893].

the general sense the term may be taken to describe a state in which the workers or the masses, rather than the bourgeoisie or capitalists are the dominant class. Theoretically it is controlled by a class, not a dictatorship in the sense of absolute and total rule by one individual. So far as the record before us indicates, the concept is a fluid one, capable of adjustment to different conditions in different countries. There are only meager indications of the form the 'dictatorship' would take in this country. It does not appear that it would necessarily mean the end of representative government or the federal system" [320 U. S. at 142, Ex. KU, R. 11,000-11,004].

Because, according to her understanding, Marxism-Leninism stands for the proposition that the working class will lead the way to greater democracy and to socialism the Communist Party has adopted a policy of concentration on building the Party among workers [R. 10,429-50]; the Party seeks to build itself as a strong mass Party with labor as its base [Ex. 150, R. 1582; R. 11,049-53]; there is concentration in basic industries in each locality because that is where workers are found in largest numbers and because these workers have great influence throughout all of labor; the objects of the policy are to help the workers win improvements in their present conditions, to encourage them to take the leadership "in building a people's movement for peace and democracy" and to lead them to understand "the ultimate need for socialism" [R. 11,085; R. 11,081-5].[13]

To achieve these purposes, petitioner testified, the Party is organized and functions according to a set of principles

[13]This is what was taught in Party educational outlines and reports [Ex. 175, R. 1526; Ex. 55, R. 1582; R. 2252].

known as democratic centralism; it requires that the members of the organization at all levels participate in electing its officers, who, once they are elected, must report back regularly to the membership concerning the manner in which they are carrying out their responsibilities; "it means that after full discussion of problems has taken place and decisions have been reached, that the minority accepts the decision of the majority" [R. 11,059; R. 11,058, App. Item 37, pp. 167-8].[14]

3. Petitioner's Understanding of the Revolutionary Change From Capitalism to Socialism.

As petitioner understands it, the change from capitalism to socialism is revolutionary in character. She defines revolution as the replacement of one set of economic relations by another and the transfer of state power from one class to another, which transfer under some conditions may be accomplished by peaceful, and, under others, by violent means.[15] She believes in the legal right of revolution in the United States—that is the right to achieve these fundamental changes through the democratic processes and she opposes any attempt by a minority to seize power, basing her beliefs in part upon the writings of Thomas Jefferson and other great Americans, and in part upon Marxist writings [R. 10,399; Exs. KJ, KK, R. 10,653-60, 10,663-5].

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[14]One of the respondent's witnesses testified in a similar vein [R. 2455] and the Party's Constitution and official publication define democratic centralism in the same manner [Ex. 21, R. 1518; Ex. 55, R. 1582; R. 1798-9].

[15]A Party outline similarly defined the term revolution [Ex. 626, R. 1425; R. 1785]. *Cf.* Inst. 14 J in which the trial court defined revolution in the same manner [R. 13,764-6, App. Item 2(m), p. 56]. *Cf.* also quotation from "History of the Communist Party of the Soviet Union" Ex. 28 [R. 1362; R. 7034-5, App. Item 68, pp. 257-8; R. 1491-2].

According to her understanding it is the object of the Communist Party to win the support of the majority for socialism and then to lead them in accomplishing this revolutionary objective through peaceful means; the revolutionary change to socialism is impossible of accomplishment without the support of the majority [Ex. KM, R. 10,684; R. 10,675-88, App. Item 92, pp. 351-4; R. 10,691-4, 10,950-2]; until the majority desires socialism it is the program of the Communist Party to seek to convince the people of its necessity and to fight for their immediate needs within the framework of our present system [R. 10,694-7].

Petitioner pointed to various American Marxist writings as setting forth the view she accepts that in the United States a change to socialism could and should be achieved through the peaceful action of the majority of the people if and when they desire it [Ex. KT, R. 10,831; Ex. 515, R. 3036; Ex. BG, R. 2955; R. 10,793-9; 10-821-37, App. Item 70, pp. 262-4; R. 11,413, 11,771-2].[16] In this connection the holding of the United States Supreme Court that this is a tenable conclusion with respect to the meaning of Marxism-Leninism fortified her construction thereof [Ex. KU, R. 11,002; R. 10,837-9; R. 11,010-15, App. Item 96, pp. 359-61.[17] 'Shortly after the decision in

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[16]On this she agreed with the interpretation of these doctrines testified to by two professors in the *Schneiderman* case and referred to by the Supreme Court in that case (320 U. S. at 129, Ex. KU, R. 11,002; R. 11,005-6].

[17]"A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open" (320 U. S. at 157).

that case was handed down in 1943, petitioner attended a California statewide Communist Party meeting where co-petitioner Schneiderman said that the conclusions found to be tenable by the Supreme Court in his case represented his views, which he had presented at the trial [R. 10,954-62, App. Item 95, pp. 358-9].

Petitioner Yates in 1943 and again in 1951 read the transcript of the trial in the *Schneiderman* case and the testimony of co-petitioner Schneiderman as to the meaning of Marxism-Leninism; except for two or three minor points in formulations, she concurred with his views thereof and by her reading of the transcript sharpened and clarified her understanding of the subject [Exs. MM 1, MM 2, R. 11,731; R. 11,726-37].

Petitioner understands a revolution to involve two stages, the first being the gaining of power by the new dominant class and the second, the use of that power to change the existing social order; once power is achieved whether by the ballot or otherwise the state uses the legal instruments of force—the army, police, jails, etc.—in the accomplishment of the social change just as any state uses such power in enforcing its laws; many Marxist-Leninist writings speak of violent revolution in the sense that the legal force and violence of the legally established state will be used to carry out the social change, these writings being polemics against the views of the Anarchists who conceive of the state and its apparatus of army, police, etc. disappearing once power is achieved by the working class [Ex. 39, R. 1352; R. 10,706-9, App. Item 60, pp. 238-41; R. 10,711-31, App. Item 61, pp. 241-3; R. 10,854-70; Ex. 146, R. 1363; R. 10,925,

R. 10,940-50];[18] the violence referred to is that of the legal state necessary to suppress attempts at violent counter-revolution, both from within and from foreign invasions [R. 10,714-15; R. 10,820--1; R. 10,863-5, App. Item 66, pp. 254-5; R. 10,870-3; R. 11,709-11, App. Item 62, pp. 243-5]; in addition to opposing the Anarchists' theory that the state should be abolished when the workers come to power, Marxist-Leninist writings equally condemn the view of Kautskyites that the workers could simply take over the political machinery of the capitalist state and use it for its own purposes instead of creating a new and different machinery of government, which like that of all other preceding states would have its instruments of coercion and force to enforce the laws of the state; it is in polemics against the views that either no state, *i.e.*, no apparatus of coercion, is required by the workers or that the capitalist state machinery can be used as is to establish socialism, that Marxist-Leninist writings most frequently use emotionally surcharged language referring to "violent revolution" and dealing with the necessity for the creation and use of a new form of state, including its "instrumentalities of violence" such as an army and police, by the workers *after* they achieve power in order to complete the transformation from capitalism to socialism, *i.e.*, the revolution [R. 11,538-41; R. 10,912-26, App. Item 57, pp. 227-33; R. 10,933-7; R. 11,701-2].

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[18]Respondent's witness Saunders testified that he was so taught in a state school [R. 1082-7, App. Item 58, pp. 233-8].

4. PETITIONER'S UNDERSTANDING OF THE APPLICATION OF GENERAL PRINCIPLES OF MARXISM-LENINISM TO SPECIFIC TIMES, PLACES AND CONDITIONS.

According to her understanding the general principles of Marxism-Leninism must be applied differently under different conditions; however, by studying their operation under past conditions, it becomes possible in some degree to anticipate how general principles are going to be applied under new and different conditions; there are "certain general conclusions that were reached" [R. 10,192], in basic works, as for example the Communist Manifesto; these included Marxists' analyses of the capitalist system and of classes in society and their conclusion that the capitalist system shows the need for and opens the way toward a socialist system; such general conclusions do apply to the United States, but the forms and methods used in applying such general principles will vary in accordance with the time, country and historical circumstances; thus Marxism-Leninism is the exact opposite of a dogma to be mechanically applied in the same manner under different conditions[19] [R. 10,192-3, App.

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[19]Reference was made by petitioner to many Government exhibits which according to petitioner support this view of Marxism-Leninism, including particularly differences in application of principles between autocratic countries like Czarist Russia and democratic countries like the United States [R. 10,300-24]. Respondent's own witnesses also testified to the same effect and Marxist-Leninist writings offered both by petitioners and respondent contain similar statements [R. 2602; 2630; 2636; 2639-47, App. Item 51, pp. 211-17; R. 2670; Ex. 608, R. 483; Ex. 28, R. 1362; Ex. 12, R. 3784; R. 4143-4, App. Item 48, pp. 206-7; R. 2982-4, App. Item 49, pp. 207-8; Ex. 147, R. 494; R. 1126; Ex. 39, R. 1352; R. 2618]. There is also evidence that from time to time, Marxist-Leninists modify their views. In this connection respondent's own witnesses testified that some writings at one time circulated by the Party in the United States were later repudiated as incorrect [R. 2602].

Item 47, pp. 205-206; R. 10,293-8; R. 10,324-33, App. Item 75, pp. 274-90 and App. Item 89, pp. 348-9; R. 10,706-8; Ex. KS, R. 10,789; Ex. BB, R. 2666; R. 10,-789-93; Ex. JO, R. 10,387; R. 10,386-97, App. Item 50, pp. 208-11; Ex. 163, R. 4535; R. 10,276; R. 10,417-19, App. Item 52, pp. 217-19; R. 10,430-3, App. Item 53, pp. 219-21];[20] it is impossible to anticipate all events in world history and as new developments take place in the world new studies must be made and new conclusions added to the body of Marxism-Leninism; the advent of fascism was such a new development [21] which from a Marxist-Leninist standpoint demanded the building of a great peoples' movement to stop fascism and to defend peace and democracy, which movement could, by teaching the necessity of socialism from the experience of the people, develop in the direction of socialism and open up new perspectives for its peaceful achievement [R. 10,332-5, App. Item 54, pp. 221-4].[22] These conclusions were reached by considering and applying to the concrete situation "the essence and substance of Marxism-Lenin-

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[20]In *Schneiderman v. United States*, 320 U. S. 118, 145, n. 26, an example of Lenin's is cited indicating that it does not follow from the fact that in Russia the socialist revolution led initially to the restriction of the franchise, that the same result would flow from socialist revolutions elsewhere.

[21]See to the same effect testimony of respondent's witness Lautner [R. 2649, App. Item 72, p. 269] and "United Front against Fascism", Ex. 119 [R. 661-5, App. Item 73, pp. 269-72].

[22]A Party educational outline detailed how, it was believed, the transition to socialism through the democratic processes would occur [Ex. 450, R. 3549; R. 3720-32, App. Item 74, pp. 272-3]. Petitioner, in accordance with her understanding of Marxism-Leninism, as applied to the situation in the United States, engaged in activities designed to "bring a greater degree of democracy" to the United States (as will be more fully discussed *infra*) [Ex. JJ, JK, R. 10,339; Ex. JM, JN, R. 10,349; Ex. JO, R. 10,357; R. 10,335-42; R. 10,347-52; Ex. JT, R. 10,458; R. 10,343-49].

ism rather than memorizing the words or the letter of it" [R. 10,376]. This process she testified was the one required by Marxism-Leninism and she referred to specific passages from Government Exhibits so indicating [Ex. JO, R. 10,387; R. 10,376-401]. Petitioner's view is that even as applied to the time and circumstances to which specific Marxist-Leninist writings relate, many of the passages are polemical and every word cannot be properly read literally [R. 10,851-3];[23] her opinion concurs with the Government's concession in the *Schneiderman* case (320 U. S. at 148) that "some communist literature in respect of force and violence is susceptible of an interpretation more rhetorical than literal."

Marxism-Leninism, she testified, is for her a guide to day to day action; it provides an understanding that will facilitate the further advance of society with the least hardship for society as a whole [R. 10,430-1].

Petitioner firmly denied the charges against her. She asserted her belief in the right of revolution which at certain stages and places in history could only be accomplished by violence but for which our founding fathers provided an alternative, that of "legal revolution," the substitution of "the appeal to the will of the people" for "the appeal to arms"; ". . . so long as the democratic channels, the democratic processes are open, so long as the people have a way to express themselves, they can bring about change in a peaceful and legal manner."[24] She specified: ". . . the only situation or circum-

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[23]". . . Political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written" (*United States v. Schneiderman*, 320 U. S. 118, 154.)

[24]From an article by Henry Steele Commager published in the New York Times and adopted by petitioner as expressing her views [Ex. MK, R. 11,161-70].

stances under which I would conceive of the use of force would be these. First, if the majority of the people decided that a new social order was necessary, so expressed themselves, let us say, through the vote, through an election, and yet the capitalist class refused to accept the expressed will of the people and resisted by force. Just as the slave owners in the South resisted by force the election of Lincoln. Or, as a second instance, force would be involved if, after the election or establishment of a working class state, the ousted capitalists attempted to regain power by utilizing force and violence and other methods at their disposal" [R. 10,725].[25] She asserted her dedication to keeping the democratic traditions of our country alive in order that the majority may determine their own destiny through peaceful means. It is within this framework that she stated her adherence to Marxism-Leninism and her intention to fight for the establishment of socialism in this land [R. 11,153-70; 10,174; 10,691-5, App. Item 71, pp. 264-8; R. 10,700-3, App. Item 94, pp. 357-8; R. 10,939].[26]

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[25] *Cf.* the following language of Lenin: "In order to obtain the power of the state the class conscious workers must win the majority to their side. As long as no violence is used against the masses, there is no other road to power. We are not Blanquists, we are not in favor of seizure of power by a minority" quoted in *Schneiderman v. United States*, 320 U. S. 118, 156 in support of the proposition that it is a tenable conclusion that Marxism-Leninism does not advocate the violent overthrow of our Government.

[26] *Cf.* with the quotation in *Schneiderman v. United States*, 320 U. S. 118, 156 of the following language from Stalin's work on "Leninism" ". . . . the proposition that the prestige of the Party can be built upon violence . . . is absurd and absolutely incompatible with Leninism." This "Marxist classic" was introduced here as respondent's Ex. 146, R. 1363 [R. 3638-9]. *Cf.* also with language in Party outlines and what was taught in Party schools [Ex. A, R. 932; R. 10,911-12; Ex. 626, R. 1435; R. 1800-2; R. 1788; Ex. 201, R. 2751; R. 3150-1; R. 3056].

5. The Evidence of Petitioner's Activities.

There is evidence of the following meetings and conventions attended by petitioner: in 1937, a District meeting at one of which there was criticism of a "Trotskyite" article appearing in the Western Worker [R. 447-51], another at which the setting up of the People's World and a letter concerning it from the Party's National Committee were discussed [R. 439-44, GA 3-5] and meetings at which the content of the "Western Worker" was the subject under consideration [R. 445-7, GA 5-6]; between 1944 and 1948 many meetings of the Party County and State Boards [R. 5431-53, GA 223-34; R. 7771-8, GA 358-60]; in 1945 the California State Convention at which the reconstitution of the Communist Party was considered [R. 615-22, GA 14-16]. In the summer of 1946 she attended two meetings at which the issue discussed was the refusal of a dissident group to work with the Party in opposing the extension of a certain machinists' strike. At one of the meetings charges against the "dissidents" for "anti-party activity" were the subject of a hearing, following which the "dissidents" were expelled by a vote of the membership. Although there is evidence that petitioner Yates spoke at one of the meetings, there is nothing in the record about what she said [R. 4386-93, GA 150-3].[27]

Later in 1946 she attended two branch meetings at which two members of the branch were charged with attacking the Party leadership in a union, associating with expelled members and supporting the views which had led to such expulsion. In defending himself, one of the

[27]The expulsion of these members, who were generally referred to as "leftists", will be discussed further *infra*.

members charged, accused the Party of not being a revolutionary one. Whereupon petitioner Fox, who was also present, said that the Party was "not going to stick its neck out to support every whim" that came into the mind of the person under charges "and take a chance of getting its head chopped off"; that the Party was "revolutionary"; "that he wanted to see the overthrow of this lousy system just as much as anybody else present, but there was a time and place for militant action and it had not yet arrived" [R. 4386]. There was no evidence as to what if anything petitioner Yates said [R. 4381-6, GA 147-50].

In November 1946 she spoke at an Embassy Auditorium meeting at a rally for American-Soviet friendship held on the 29th Anniversary of the U. S. S. R. The meeting was directed to the "fight against danger of war" and against the "Republican drive to eliminate all rent control" [R. 4337; R. 4334-8]. She spoke on Soviet power and its influence in Burma, Yugoslavia, Czechoslovakia, Bulgaria, France and Italy [R. 3902-4, GA 135-6].

In 1947 she presided at a meeting of club chairmen concentrating on transportation [R. 5458-9]; installed new officers in a club [R. 5457-8]; attended a meeting in San Francisco at which William Z. Foster spoke [R. 4481-2];[28] and, at a club meeting, assisted in the reregistration of club members [R. 6581-2, 6589-91, GA 282-4]. In 1949 she spoke at a meeting "opening the press fund drive for the People's World" [R. 3577]. In 1950 she attended the Party's State Convention [R. 11,316, GA 403-4]. Before the Convention it was announced that she was on a special committee to help develop the pre-

[28]The evidence that he spoke on his trip to Europe and the need for building a third party was stricken from the record.

convention discussion [Ex. 181, R. 2832; GA 99-100, 579]. In 1951 she met with Los Angeles Party leaders, at which time she met with petitioner Carlson [R. 11,231-4, GA 394-5].

Respondent's witness Daisy Van Dorn testified to two incidents involving petitioner Yates. On March 8, 1945 the witness, whose name was then Mrs. Rodman, was employed as an elevator operator in the building in San Francisco where the Communist Party maintained its offices. At that time she joined the Party at the request of the F.B.I. [R. 7765]. According to her testimony she received compensation from the F.B.I. for her services as an informer at the rate of $15 a month for about six to eight months and thereafter at the rate of $50 a month up to about a month or two before June, 1948 during which month or two she received more [R. 7888-90]. However, the respondent stipulated that during this period she received as such compensation a total of $4,265.00 [Ex. NA, R. 12,156; R. 12,155-62].[29] She testified that she would accept no witness fee for her testimony and that she had accepted compensation as an informer only because she had a very sick husband [R. 7889-90].

In April, 1945, during the United Nations Conference in San Francisco, this witness testified that she attended a reception for "Mother Bloor." She went on: "And she (Mother Bloor) said she was so happy at being in San Francisco at this time on the eve of our great rebellion district (*sic*). She said it is not far off, and she said, 'I am 83 years old and I will live to see this

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[29]The period covered was approximately 42 months indicating average payments of $100 a month, of which $405 was earned in 1945, $150 in 1946, $1450 in 1947, $660 in 1948 and $1000 in 1949.

bloody battle through.' She said, 'There will be blood flowing in the Streets.' She says it is going to be a wonderful revolution. And she said, 'I hope each and every one of you here will be true to us.' And she said, 'Win this country for us.' She said, 'If you do, you will be in Washington because we are going to take over this country and run it in a socialistic manner.' She said, 'Just be a good Red Bolshevik and remember there are three S's—slick, sly, and smooth.' But, she said, 'always be nice to people, treat them, talk to them in a nice churchy way.' She says, 'Don't be rough. You won't win the people over that way.' She really gave a wonderful talk. And then she also told us that . . . she said the day of the revolution was nigh; we were on the threshold of this revolution and she says 'We are prepared to the point that we have arms awaiting for us'" [R. 7820].

On cross-examination the witness conceded that Mother Bloor at this meeting said, "I am happy to have lived to see the eve of our great victory over fascism. . . . It is wonderful that all the peace-loving nations of the world are gathered in San Francisco to form the United Nations which should be the basis for a lasting peace. . . . The forces of fascism are on the run and you and I will live to see the final victory over the forces of fascism," and that she talked "about the great loss that this country had incurred upon the death of Mr. Roosevelt who had died a few days earlier"—that "she said we had lost our best friend, that he has stood beside us, and that we don't know about Truman, that we are going to give him a trial" [R. 8002-3].

The witness testified that the next day she had a conversation with the co-petitioner Schneiderman in which

she said that she "enjoyed that reception very very much and that their table looked beautiful. They had a buffet table set." And she went on: "And I thought that Mrs. Bloor was a very eloquent speaker. I told him I thought she sang wonderfully for a woman in her eighties. I also said that she was quite privileged to go up and be at a conference with Molotov, and she so enjoyed that corsage that was given to her—by whom, I don't know. And he said, 'I am glad you enjoyed it, Mrs. Rodman. But,' he said, 'we don't want anything that went on at that meeting to be divulged to the rank and file.'[30] He says, 'There are different classes'—not classes of people—'but different classes, different in our Communist Party.' And he says, 'Just keep everything that Mother Bloor said at that meeting to yourself, because we wouldn't have that go through the party.' He said that the party—there was only a few invited to that party, and we want that information to be kept quiet, everything that she said. So I have never divulged it" [R. 7817-18].

The witness also testified that on the same day she had a conversation with the petitioner Yates in which she told the petitioner Yates how much she enjoyed the reception and was told by said petitioner to say nothing about the reception, to keep everything to herself. "You know that very few were included in that reception . . . so be quiet about it" [R. 7818-20].

The same witness testified that the reception was held at the home of a Mrs. Batchelor, that she did not know Mrs. Batchelor to be a Communist Party member, that

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[30]At the time that the witness attended this reception she was a rank and file member of the Communist Party and had been a member for a total period of about one month [R. 7989-8004].

she received a printed invitation to the reception which she did not turn over to the Federal Bureau of Investigation, that she knew of two persons in attendance at the reception who were not Communist Party members and there might have been others, that the two she knew of were ladies who were neighbors of Mrs. Lambert who invited them there, and that these two expressed their shock at what they heard [R. 7989-95].

A number of photographs of the persons present were taken at this reception [R. 8003-4]. Mrs. Batchelor, at whose home the meeting was held, testified that she was not a Communist, that her house was rented for the reception, that none of the blood and thunder statements attributed to Mother Bloor by Daisy Van Dorn were made, that the reception was to such an extent an open one that there was present at it a young man who just happened to be staying with her at the time [R. 12,113-17, 12,127].

The petitioner Yates testified that the affair was not a Communist Party affair, that it was purely social, that Mother Bloor did make a speech in which "she addressed herself to the victory over fascism on the military field that was then in sight, and said that she was glad and happy to have lived to see the forces of fascism, the Axis, coming to defeat . . . that she regarded it as a tragedy that President Roosevelt's death had occurred at such an untimely point; and that she would have wished that the war-time leadership he gave to the nation would have been continued for the building of an enduring peace. And she also said that the world would be a much better place to live in when peace was assured. And I am sure she also said that she believed and hoped and

believed that there would come a day when the people in our country would see the need for a socialist system to bring them a permanent peace and prosperity as she saw the need for such a thing." Petitioner testified that there was no truth to the version of the speech given on direct examination by the witness Daisy Van Dorn. She denied that after the reception she had any conversation with Daisy Van Dorn concerning it [R. 10,841-9].

The second remarkable item added to the record by this witness was that in April, 1947 she bought five ten-cent chances at a raffle conducted at her Communist Party club; that she won, as a result of which she obtained the book "The History of the Civil War in the U. S. S. R." [Ex. 251, R. 7810], for which she then paid $3.08; that the next day she talked to petitioner Yates who told her that she must be very careful of the book, that she should read it through and turn it over to the chairman of her club, that "it was the general outline of which the revolution was to be carried on" and that "there were very few copies to send over from Russia." The witness said that the same day, outside of the presence of petitioner Yates, co-petitioner Schneiderman told her that there were about 500 copies of this book smuggled into this country by the loyal seamen of the Communst Party and that there were a total of six copies available either for the state or for the city—she did not recall which [R. 7802-10].

The witness testified that nobody at the club meeting had told her to keep the book a secret [R. 8023]. It was stipulated by the parties that the Los Angeles Public Library circulates the books and has three copies, ordered by the Library from an English concern in London on

August 4, 1947 [R. 8033]. It was also shown by documents admitted into the record by stipulation that the "History of the Civil War in the Soviet Union" was in fact shipped in the regular way and passed through United States Customs [R. 11,132-4; Exs: HT-1 and HT-2, R. 11,132].[31]

Petitioner testified to a whole series of acts of force and violence and harassment directed against the Communist Party and its members, including the destruction of the Party offices and attacks on private homes by both police and vigilantes in 1934 [Ex. JT, R. 10,458; R. 10,221-34, 10,470-81, 10,491-503]. Her experiences indicated the necessity of some secrecy ("underground" in the vernacular of respondent) in the work of the Party and in the names of its members precisely for the purpose of protecting its legal activities against illegal violence, job discrimination and other harassment [Ex. FG, R. 5095; Ex. BJ, R. 2975; R. 10,494-8; R. 10,516-17; R. 11,068-80; R. 10,479-80, R. 10,491-93, App. Item 76, pp. 290-3].

The conclusions drawn from her own experiences were fortified by her understanding with respect to other illegal attacks upon the Communist Party, including the Palmer Raids [Ex. MD, R. 11,030; R. 11,028-37], raids upon Party headquarters, attacks upon Party leaders and their homes and vigilante action against meetings of the Party

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[31]The petitioner Yates denied that a conversation between herself and Daisy Van Dorn concerning this book ever took place and testified that the book was sold openly in book stores (which was never denied) and that therefore it was ridiculous from any standpoint to keep the book a secret [R. 10,849].

or meetings so labelled [Ex. MD, R. 11,030; R. 11,037-42; Exs. MG, MH, MI; MJ, R. 11,076; R. 11,075-80].[32]

In 1944, the Communist Party was dissolved and the Communist Political Association was formed [R. 1222, 4232, 4246, 4251-2; R. 11,086; Ex. 42, R. 581; R. 605]. In 1945, the latter was dissolved and the former reconstituted. Petitioner's belief is that the dissolution of the Communist Party and the formation of the Communist Political Association were based upon an erroneous construction and application of the principles of Marxism-Leninism: the Association was founded on the concept that the workers would not have to use their economic and political power (engage in the "class struggle") to achieve improved conditions but that the capitalist class would, without a fight by the labor movement, itself improve the conditions of labor, for example, by doing such things as voluntarily doubling wages; whereas the Communist Party was reconstituted on the theory that "the working class can make gains and advances its interests" only "by reliance upon its own organized strength" rather than upon the good will and intelligence of the "capitalist class"; in addition, the Association did not adequately recognize that the working class had to play the decisive role in the fight against fascism; the Association "virtually

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[32]There was a considerable volume of evidence from respondent's witnesses and in the form of exhibits showing illegal attacks upon the Party and its members and violation of their legal and constitutional rights [R. 5901; Exs. FX, GC, R. 5922; Ex. GA, R. 5923; R. 5911-28; R. 5893; R. 4471, 1332]. One of respondent's witnesses testified that a "New York underground" was created because "it was necessary to have a structure in case even if the Party is driven underground, to have an organization force [*sic*] that can fight its way back into legality" for which purposes there were prepared "printing machines, mimeograph machines" and similar weapons [R. 2255, 2258, 2283-7; R. 2565, App. Item 76, p. 293].

abandoned the perspective of socialism, and in practice gave up any serious education for socialism"; the Communist Party, on the other hand, was reconstituted on the theory that while socialism "was not an immediate objective but an ultimate goal;" education for socialism was essential because only it could permanently solve the problems of the people;[33] however, neither the Association nor the Party stood for the proposition that the Government of the United States should be overthrown by force and violence [Ex. 442, R. 6712; R. 11,085-100, App. Item 9, pp. 86-91]; the Association, like the Party, stood for full support to the war effort and the policies of the Roosevelt administration generally, but the Association, because it did not run its own candidates for public office, failed to put forward this program to the best effect and therefore did not make the maximum contribution possible to the war effort [R. 11,100-5]; both the Association and the Party also sought "to achieve the widest democratic coalition and the most effective anti-fascist unity of the nation" designed to destroy fascism, curb the powers of the trusts and monopolies, and thereby advance the economic welfare of the people and protect and extend American democracy [Ex. 42, R. 581; R. 10,569-70, App. Item 11, p. 97].[34]

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[33]The fact that Marxism-Leninism is subject to different interpretations is indicated by the testimony of petitioner on this score: "I believed that I was continuing these Marxist principles and did not until later realize that I had helped distort them" [R. 11,099].

[34]To the same general effect as the testimony of the petitioner on this score, see the testimony of respondent's witnesses Saunders [R. 1213-20, App. Item 12, pp. 98-102], Hamlin [R. 1927-34] and Lautner [Ex. 42, R. 581; R. 2445-82, App. Item 13, pp. 102-14]. See also respondent's Ex. DW, R. 4264; [R. 4264-9] and Ex. 42, R. 581; [R. 4239-48, 4253-4, 4358-61, App. Item 10, pp. 91-7; R. 1927; R. 11,090].

Following the reconstitution of the Communist Party, there were warnings from the leadership of the Party against falling into "leftism," as for example, by calling for socialism (as distinguished from educating for it) before the people desire it. As petitioner Yates defined it, "a leftist position tends very much to overlook the wishes of the majority and tends likewise to push forward a position that is in essence a minority position" [R. 11,106; Ex. 442, R. 6712].

Respondent's witness William M. Foard (whose testimony concerning himself casts light on all of his testimony) testified that when he joined the Communist Party in 1945 he did not have the intent to overthrow the Government by force and violence but that he formed it several months later when he first became friendly with one of the "leftists" referred to above who was later expelled for his "leftist position." The witness continued his association with the "leftists" after they were expelled and while he was still a member of the Party. He ceased having the intent of violent overthrow several months before he left the Party. But he did not leave the Party because of any difference with it on that issue, but rather because he disagreed with the Party's support of his union's leaders whom he believed corrupt and "not fit for union office" [R. 4709-13, 4846-51].

He testified that while he was a member of the Communist Party he was taught in his club (not by any of petitioners) that a transition from capitalism to socialism would be a "drastic change" and hence a revolution; that it was the object of the Party to achieve the establishment of socialism by the free choice of the majority of

the American people; that it was predicted that when the majority would thus exercise their free choice, the minority would not be willing to accept the wishes of the majority and would resist by violent methods. Thus, he understood, because the minority would not permit the majority to make such a revolutionary change peacefully, part of the process of the revolution would be violent [R. 4902-3, 4912-13].[35]

During 1948, before he left the Party, he heard discussions of the new perspective of a peaceful change from capitalism to socialism as embraced in William Z. Foster's "The New Europe" [Ex. BA, R. 2548] but this was a matter with which he "was not too much concerned" or "interested" [R. 4876-8].

This witness testified to a Party meeting held in February, 1947 at which petitioner Yates and co-petitioner Schneiderman spoke, the latter on the subject of "left sectarianism and right deviations.". There is nothing in the record concerning what petitioner Yates said. According to the witness Foard, co-petitioner Schneiderman stated that the "leftists" who had been expelled wanted the Party "to embark on adventurous campaigns that would lead to the destruction of the party"; that "before revolution can be thought of, we must first build a mass base among labor, farmers, and minority groups"; that the "ultimate goal was the establishment of socialism"; that "finance capital would never give in without a fight";

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[35]Note that in *Schneiderman v. United States,* 320 U. S. 118, 153, n. 40, many official utterances of the Party were disposed of by the Court: "These statements are open to an interpretation of prediction, not advocacy of force and violence."

that thus a revolution would involve violence and sacrifice [R. 4376-80; GA 145-7].[36]

In 1946 petitioner Yates wrote an article for "Political Affairs" concerning "leftists," entitled "The Struggle Against Deviations and Factionalism in San Francisco." This article was a "polemic" against the people who "did not agree upon the building of a people's anti-fascist coalition around the immediate problems and issues before the people" and who advocated "an immediate move toward socialism." These leftists were criticized in the article because they opposed the Party program in the following respects; they did not approve of the Party's program for peace; they did not agree that the Party should do everything possible to join in a coalition campaign with all progressive forces to defeat reaction; they opposed participation in election campaigns as part of an anti-fascist coalition; they disagreed with the Party's criticism of the Machinists strike and of the Party's disapproval of the strike being spread to the waterfront and of the tying up of troop ships and of otherwise extending the strike; in connection with this same strike they were in favor of the Machinists strike being spread into a general strike while the Party opposed this and urged settlement of the Machinists strike; they took the position that "strikes are always a gain for the working class regardless of whether they are won or lost," whereas the Party opposed this "leftist" position; they disagreed with the Party's support of the principle of settlement

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[36]Compare this with the finding of the Supreme Court in the *Schneiderman* case that a "tenable conclusion" was that the Party "justified" violence "only" against "an attempted forcible counter-overthrow" or "to enforce the majority will" if "peaceful channels were no longer open" (320 U. S. at 157).

of a maritime dispute without a strike and of the Party's opposition to the calling of a maritime strike for political reasons; they differed with the position of the Party that the Fair Employment Practices campaign was important. Petitioner's article opposed the position of the "leftists" and supported the viewpoints which had been taken by the Communist Party [Ex. 639, R. 1582; R. 4456, 4674-4708; App. Item 83, pp. 334-43]. The "leftists" were expelled from the Party because of their positions, in which they persisted [R. 11,110-11].[37]

There is other specific evidence of petitioner Yates' connection with Marxism-Leninism and her interpretation thereof. In 1937 petitioner assisted in arranging for and conducting a Party State school. According to one of respondent's witnesses, in lecturing at the school on the organization of the Party, petitioner used Exhibit 61 [R. 523], "The Communist Party, a Manual on Organization," and referred to various writings of Lenin and other Marxists. Although the respondent's witnesses attended the lectures, the respondent offered no testimony as to what portion of the books were used or what was said with respect to them [R. 248-9, 463-5, 472-8, 523; R. 458-60, 463-66, 498, GA 8-9]. Petitioner testified that she did in fact teach at this school but that her subjects were the "American Revolution of 1776" and the "Civil War and the Reconstruction Period following it," and she submitted the lecture notes used by her at the school. These notes contain nothing which by the

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[37]The witness Foard testified that this article was discussed at his club, from which "leftists" were expelled, and in that discussion the differences between leftists and the Party were confirmed [R. 4674-5, 4687-93, 4696-7, 4702, 4705-6, App. Item 83, pp. 334-43].

remotest inference could be construed as advocating the forceful overthrow of our Government [Ex. KN, R. 10,658; Ex. JG, R. 10,273; R. 10,653-63].

She taught a Marxist class in 1947, but respondent's witness who attended the class did not testify at all as to what was taught [R. 7799-800, GA 368-9].

In 1949 petitioner together with co-petitioner Schneiderman prepared an educational outline on Marxism-Leninism and assisted in the preparation and approved the contents of two outlines on American History and one on "The Negro Question." These outlines give references to the works of Marx, Lenin and Stalin "not to be used as a blueprint" but in order to gain an understanding of the main principles contained in these works to be utilized to assist "in finding ways to solve problems today" [Ex. 163, R. 3545; Exs. JF, JG, JH, R. 10,273; R. 10,271-6, 11,255, GA 396-7]. In the History outlines non-Marxist writers are frequently cited and the reasons given for the study of American History include the gaining of an understanding of the democratic and socialist traditions of this country in order "to help build the broadest coalition for democracy and peace" [R. 10,279] and their use in the "further development of working class movement toward socialism" [R. 10,278-84].

Also in 1949 petitioner examined and approved an outline for new members classes [Ex. LA, R. 10,909-10]. This outline stated that socialism is needed in this country and in order to achieve socialism "it is the duty of each Communist to keep educating the American working class on the need for the establishment of socialism as the only secure method of taking care of the needs of all the people," that the United States would have to work

out its own road to socialism in relation to its "particular history, traditions and concrete conditions" [R. 10,911].

In 1946 petitioner Yates jointly with petitioner Carlson prepared "A Handbook for Club Officials" [Ex. MF, R. 11,056] to help organize the work of Party clubs. This states "that the aim and purpose of the activity of the Communist Party club is to bring some understanding of the need for socialism and to win improvements in the conditions of workers today." It proposes as issues "the fight for jobs and wages, fight for FEPC, fights for peace, election campaigns, city issues and so on." As methods of work it suggests public meetings and forums, circulation of the press and literature and of petitions, letter writing campaigns, mass delegations and similar forms of activity [R. 11,057-8].

Petitioner on several occasions was a Communist Party candidate for public office. In 1943 she was a candidate for the San Francisco Board of Supervisors on a program calling among other things for a city committee on race relations, which was created in 1944 and to which she was appointed as a representative of her organization [Exs. JP, JQ, R. 10,357; R. 10,353-66; Ex. LR, R. 10,365, App. Item 19, pp. 126-7]. She ran again for the same office in 1947 and 1951. In the 1947 campaign she distributed literature calling upon citizens to register and vote, and she proposed night meetings of the Board of Supervisors, opposed the sales tax, urged an attempt to get more federal funds in housing, advocated the freezing of rents, proposed action to eliminate segregation, restrictive covenants, and discrimination, including an F.E.P.C. program, condemned police brutality, advocated slum clearance, more recreation centers, large-scale

public works, a municipal low fare subway and employment of women on municipal railways, and said these things could be accomplished only through a new municipal administration which included representation of working people [Exs. EN, EP, EK, EL, EM, R. 4636; Ex. JW, R. 10,584; Ex. JA, R. 10,220; Exs. KB, KC, R. 10,599; Exs. KD, KE, R. 10,601; R. 4632-40, App. Item 20, p. 127; R. 10,577-604].

Petitioner engaged in many other activities. She participated in 1934 in union campaigns to raise relief and public works standards [R. 10,444-6]; in 1938 in picketing of ships carrying scrap iron to Japan [R. 10,423-6]; in a recall campaign in 1946 directed against the Mayor of San Francisco because of his stand on such issues as fair employment legislation, wage increases for city employees and tax policies [Ex. JS, R. 10,434; R. 10,433-42]; in campaigns for jobs and adequate housing for Negro workers [Ex. EF, R. 10,606; R. 10,605-11]. She appeared before a state legislative committee in opposition to "loyalty oaths" at which time she challenged as a "lie" the charge that the Communist Party advocates the overthrow of the Government by force and violence [Ex. KI, R. 10,622; R. 10,621-7, App. Item 93, pp. 354-6].

Petitioner Yates considers the Constitution of the Communist Party as meaning "exactly what it says" and "that no other documents or material of any kind that conflict with the Communist Party Constitution is binding" [R. 11,080].[38] The Party Constitution adopted in 1945

[38]Here, unlike the record in *Dennis*, there was no testimony that any of the petitioners understood the Constitution as meaning the opposite of, or in fact anything other than, what it says.

and in effect at all time since contains the following clause:

[*Appeals and Disciplinary Procedure.*]

"Section 2. Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion." [Ex. 21, R. 1518; R. 5117.]

The 1948 convention of the Party added these provisions, apparently as a result of the intervening experience with the "leftists" (discussed *supra*):

[*Appeals and Disciplinary Procedure.*]

"Section 3. Any member shall be expelled from the Party who is found to be a strikebreaker, provocateur, engaged in espionage, or who advocates force and violence or terrorism, or who adheres to or participates in the activities of any group or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy through which the majority of the American people can maintain their right to determine their destinies."

[*Rights and Duties of Members.*]

"Section 9. Members are obligated to fight with all their strength against any and every effort, whether it comes from abroad or from within our country, to destroy the rights of labor and the people, or to impose upon the United States the arbirtary will of any group or party or clique or conspiracy, thereby violating the unqualified right of the majority of the people to direct the destinies of our country." [Ex. 153, R. 2089].

Henry Steinberg.

The evidence that petitioner Henry Steinberg participated in a "Lenin Memorial" meeting is discussed by the court below as illustrating the adequacy of the proof with respect to petitioners' participation in the conspiracy charged and their specific intent to achieve its alleged objective [Clk. R. 122-3].

Petitioner Steinberg was shown to have been a member of the Young Communist League as of 1936 [R. 5526]. A witness stated that in 1940 "he had come into his own as kind of the practical politician for the Communist Party" in Los Angeles [R. 5529]. At that time he participated in discussions of election campaign slogans and in planning election campaigns, including the presidential campaign and that of the Communist Party for Southern California [R. 5528-9].

In 1950 petitioner was the Party's Legislative Director for Los Angeles County [Ex. 517, R. 4551, GA 455]. He registered for voting as a Communist [Ex. 521, R. 4546-7, GA 454; Ex. 518, R. 4547, GA 454] and ran for public office as such in 1940 [Ex. 516, R. 4549-50, GA 454] and again in 1950 [R. 2826-7, GA 98-9].

On the latter occasion, petitioner, as a candidate for the Board of Education, advocated the right of teachers to bargain collectively, to be free of loyalty oaths and other inquisitorial conditions and, together with their students, to inquire freely into the domain of ideas. He urged "democratic school board practices" including the elimination of discrimination and segregation in the hiring of teachers and in the use of school facilities. He called "for a program which will train our children for peace not war, free and full education, with teachers free from

spying and fear, able to properly prepare our children to assume their responsibilities in this changing world". [R. 3282-5]. In his public speeches he asked for neighborhood rallies and the distribution of leaflets to secure support for his candidacy [R. 3277, 3286]. In 1951, petitioner spoke at a Party election rally; what he said does not appear in the record [Ex. 359, R. 2846, 2844-7].

In 1946 or 1947 he was the Party's Educational Director for Los Angeles County [R. 3941-4, GA 138-9]. He was also shown to have attended various Party meetings: a Los Angeles County Committee meeting in 1942 [R. 5583, GA 256-7]; a meeting in San Diego in 1949 at which co-petitioner Schneiderman spoke [R. 1343, GA 30]; a closed Party meeting in Los Angeles in 1950 [R. 2825-7, GA 98-9]; and the same year a Daily People's World[39] circulation drive meeting in Los Angeles [R. 2819-20, GA 95-6]. He was advertised as a speaker at a meeting sponsored in 1950 by the Party's Los Angeles County Educational Committee [Ex. 358, R. 2828]. The record is barren of anything that was said or done at these meetings.

[39]A newspaper supported by the Communist Party.

The record is silent as to the duties of the offices of County Educational and Legislative Director held by petitioner. There is no evidence of any advocacy of force and violence by him or of any agreement to engage in such advocacy at any time. Nor was petitioner shown to have been present when others engaged in such advocacy or entered into such an agreement. Petitioner is not connected with any specific Marxist-Leninist writings, let alone any of the hundreds of quotations therefrom read into the record by respondent. Nor is there any

evidence that he construed Marxism-Leninism or the program of the Communist Party as calling for the forceful overthrow of our Government or the advocacy thereof.

The evidence relied on by the Court of Appeals as establishing the requisite intent and connection with the conspiracy consisted of petitioner's chairing of a public Lenin Memorial meeting held in Los Angeles in 1949, with an attendance of between 1500 and 1700. At this meeting he made "several speeches" [R. 8067], but aside from the fact that he stated that the affair was a Lenin memorial the record does not disclose what he said. The meeting, sponsored by the Communist Party, was announced in the People's World [Ex. 737, R. 8070], as a demonstration of its support for the Bill of Rights; it was announced that the meeting would "serve primarily as a protest against the current trial in New York of 12 national leaders of the party" [R. 8072]. Petitioner Ben Dobbs made the main speech of the evening, but the content thereof was not the subject of any evidence [R. 8066-75, GA 207-11, App. Item 77, pp. 294-7].

Upon this evidence, the Court below sustained a finding that petitioner was party to a conspiracy to advocate the overthrow of the Government of the United States by force and violence and to organize, as the Communist Party of the United States, an organization dedicated to such advocacy, all with the specific intent to achieve such violent overthrow as speedily as circumstances would permit.

Frank Carlson.

This petitioner was shown to have been California State Director of the Young Communist League in 1935 and 1937 [R. 548, 5519-25; GA 11, 246]. In 1945 and 1946 he had an office in the Communist Party headquarters in San Francisco [R. 7784, 7790, GA 362, 365]. In April 1947, petitioner was State Secretary of the Communist Party in Wisconsin [R. 7790-1, 6560-1; GA 365, 280, Ex. 729, R. 7442-4]. In 1949 he was a "County Organizer" in Los Angeles [R. 2748, GA 84].

This petitioner is shown to have attended many meetings and conventions but in no instance is there any evidence as to what was said and done. Thus the record simply shows that in 1936 petitioner attended "underground meetings" of the Young Communist League in Los Angeles [R. 5976-80] and that in the same year or the next he attended a national convention of the Young Communist League [R. 6227].

In 1937 and 1938 he attended State Committee meetings of the Young Communist League [R. 5520-5, 5543, GA 246, 250]. In 1945 he "occasionally had a meeting" in the San Francisco headquarters of the Communist Party [R. 7903], and attended its California State Convention [R. 615-16].

In 1946 petitioner met in Los Angeles with one of respondent's witnesses who had been directed to Carlson by the San Diego Party Organizer and later in that year petitioner met with the Party's San Diego County Committee [R. 1345-7, GA 30-1]. In 1948 he attended a

Los Angeles County "functionaries" meeting [R. 4980, GA 183]. In 1949 he was introduced at a session of a "Marxist Institute" [R. 2748, GA 84]. In 1951 he met frequently with petitioner Yates in connection with her duties as an official of the Communist Party [R. 11,232-3, 11,252, GA 395-6].

The witness Estrada gave the most detailed testimony on behalf of respondent concerning petitioner Carlson. At the time of testifying he had been a member of the Milwaukee police force for a little over two years [R. 6468, 6497]. He is a law school graduate but has never been admitted to the practice of law in Wisconsin or elsewhere [R. 6497-8].

In 1946, before he ever had any contact with the F.B.I. and while he was attending law school and working in addition, he attended two or three Communist Party club meetings, although he was not a member. He then went to the F.B.I. and volunteered to become an informer [R. 6499-6510]. He testified that he joined the Party at the request of the F.B.I. (which request was made in September 1946), but he did not become a member until about March of 1947, prior to which he attended about 21 Party meetings [R. 6509-16]. He further testified that he turned in to the F.B.I. all written material that he received within the Party, except his own Party Card which he tore up because it "wasn't important" [R. 6521-2]. He "never bothered to read" the "stuff" he turned in [R. 6538]. His function as an informer was to keep his "mouth shut and listen" but when there was talk about Marx and Lenin he "wasn't interested" [R. 7146, 7150]. He testified that he received no compensation or expense money at all for acting as an informer,

and in fact that he spent fifteen to twenty-one dollars of his own money buying books which he turned over to the F.B.I.; the respondent stipulated that in 1947 this informer received $144.50 from the Department of Justice in connection with services performed in reporting to the Federal Bureau of Investigation [R. 6503-4, 7252-6; Ex. NA, R. 12,156, 12,155-62].

He testified that the Communist Party was always telling the Negroes to "fight for housing, fight for this, fight for that" and that Negroes "didn't have to fight before [the Communists started agitating], we always got it." His major activity while in the Party was to distribute leaflets on the F.E.P.C. and housing. In the face of government reports showing that housing conditions in the Negro District in Milwaukee were very bad and by far the worst in the city, this witness denied that any Negro housing problem existed and asserted that the Communists weren't telling the truth when they said there was such a problem. He also testified that, only because of their lack of desire, Negroes didn't work in many industries and employments and were limited to menial jobs in others [R. 6552-7, 7148-9, 7172-7215]. On reports that he turned in, he indicated which persons were white, which were Negro and which were Jewish. This was his "own idea," not the instructions of the F.B.I. [R. 7361-2].

This is the witness who testified to the following as being said by petitioner at petitioner's home in 1947 following a dinner to which the witness had been invited by him:

> "Then he went on to state that the Negroes, the party had been helpful to the Negroes in the South.
>
> "I asked him, 'In what way?'

"He says, well, the Negroes down there had received some pretty severe kicks, and he related a case where 200 white men were chasing one Negro to lynch him, and they were met by 100 other Negroes armed, who repressed their attack, the 200 white men's attack upon this one Negro.

"He said, 'Therefore, you can see that the party has been helpful to the Negro in the South.'

"I then asked him how did the people get guns, the Negro people down in the South get guns.

"He says, 'Well, the party has methods of doing so.'

"Then he says, 'You know, I would like to have you organize a United Negro and Allied Veterans of America organization,' he says, 'because it will be necessary in the event of a revolution in this country to overthrow this country by the Communist Party, that the Negro boys in the North will have to be militant enough to guide the Negro People in the South.'" [R. 6480, GA 278.]

However, the witness' contemporaneous report to the F.B.I. repeated the conversation with respect to this incident: "Negroes in the South will have to be taught the communist way of living (program which is now being carried on by the Communist Party, the C.I.O. and the *American Federation of Labor)* before they can receive fire arms in the event of *revolutionary action by the fascists* in that part of the country." [Ex. 730, R. 7444, R. 7442-3, 7446; emphasis supplied].

The witness explained that his testimony that petitioner Carlson talked about "a revolution in this country to overthrow this country by the Communist Party" was covered in the report by its reference to "revolutionary

action by the Fascists in that part of the country [the South]." He further explained that in his mind "resistance to a fascist revolution" is "similar" to "overthrow of the government of the United States" [R. 7446-50].

The witness also apparently equated capitalism and fascism, for he testified that on that occasion petitioner told him that he had been arrested some years before for "activities against the capitalistic people." The contemporaneous written report indicates that petitioner said that in 1939 he was arrested for picketing a German consulate [Ex. 730, *supra;* R. 7444; R. 6480-81; R. 7442-3, 7446]. On the same occasion, petitioner Carlson, according to the witness, instructed him to buy the Communist Manifesto [Ex. 39, R. 1352], which he described as the bible of the Party, Problems of Leninism [Ex. 146, R. 1363], Foundations of Leninism [Ex. 1, R. 1357], and the History of the C.P.S.U. [Ex. 28, R. 1362; R. 6482-4, GA 277-8]. The contemporaneous report [Ex. 730, *supra,* R. 7444] does not mention these alleged instructions or books.

The same witness testified that he attended a public social affair in 1947 where petitioner Carlson refused to give him the names of persons in attendance because some of the people "were not to be known as Communists" and "to be a true Communist, you must learn to keep certain things confidential such as their names." On this basis he reported to the F.B.I. as Communists all of the names he could obtain of those in attendance, including the name of one man he knew not to be a Communist [R. 6484-6, GA 279-80; R. 7469-76].

Another witness testified that in 1951 petitioner was at home, when his wife interrogated the witness there concerning his background and his relations with the police and F.B.I. agents [R. 2807-10, GA 90-91].

There is some evidence that petitioner, Carlson, discussed, taught and wrote on the subject of Marxism-Leninism and other subjects. In 1936 he led a discussion group in Los Angeles about building the Party press [R. 5519, GA 245-6]; he also led a study group in a park, where he "used" Lenin's "What Is To Be Done" [Ex. 266, R. 1368] and he said that "something new had happened in the world," that "we must look to Lenin for the answer . . . . in order to build our leadership among the young people and win the young people for the fight against fascism," that methods of doing this should be "dressing up the Young Communist League, opening youth centers . . . . putting on ties [and] . . . . an American front to the Young Communist League, so that people would classify us as an American organization . . . . , work in the churches, in the YWCA, and . . . . building of the youth front" [R. 5512-16, GA 244-5].

In early 1946 in San Francisco he substituted for another teacher for two sessions of a Marxist class. The record does not reveal what he taught [R. 7780-3; 7927, GA 361-2].

In June, 1946, petitioner cooperated with petitioner Yates in the preparation of a booklet entitled "Handbook for Club Officials in Outline Form" [Ex. MF, R. 11,056, R. 11,054-56]. This outline describes activities of Communist clubs indicating that the aim and purpose of such activity is to develop understanding of the need for so-

cialism and to win improvements in the conditions of workers. It urges activity on such issues as jobs and wages, fair employment practices, peace, election campaigns, etc. The methods by which these activities are to be carried on include "open meetings, state meetings, forums, leaflets and bulletins, use of Party press and literature, circulation of petitions, organization of letter-writing campaigns, organizing mass delegations around issues, organizing actions on grievances" [R. 11,057].

Sometime after the end of World War II petitioner wrote, and the Communist Party distributed, a pamphlet entitled "Let's Get Off The Dime" [Ex. FF, R. 4916]. The pamphlet dealt with the problems of reconversion as they affected the working people, the growth of unemployment after the war, the rising cost of living, and the drive against labor unions [R. 11,938-48]. It urged a strong defense of the living standards of the people, increased unemployment insurance, fair employment legislation and international collaboration for a peaceful world [R. 11,954-58]. It urged the proposition that by maintaining their trade unions strong, clean and democratic and by participating actively in the political life of their communities, the working people could most effectively protect their interests [R. 11,940-72, App. Item 36, pp. 162-7]. As for socialism, the pamphlet stated:

> "'The Communist Party recognizes that the final abolition of exploitation and oppression, of economic crisis and unemployment, of reaction and war, will be achieved only by the Socialist reorganization of society—by the common ownership and operation of the national economy under a government of the people led by the working class.' (From the Preamble to the Constitution of the Communist Party.)
>
> "That is what is called 'Socialism.'

"Only that kind of a 'reorganization of society' will put an end to a situation where, in a country like ours, one-third of the nation is 'ill-housed, ill-clothed and ill-fed.'

"Socialism is the only way out.

* * * * * * * *

"We Communists are working towards that goal. It will be realized when the decisive section of the American people line up with us. And as part of our work towards that goal we are doing everything possible now to help organize and lead the people in the fight to improve conditions under the present set-up.

"That's where we Communists stand . . . ."

Dorothy Healey Connelly.[40]

The first offices petitioner Dorothy Healey Connelly is shown to have held in the Party were those of Los Angeles County Organizational Secretary and membership on the State Board, to which positions she was elected when the Communist Party was reconstituted in 1945 [R. 3835-9, GA 124-5]. She was observed at the Party's State offices in San Francisco many times between June and December 1945 and thereafter [R. 7830-5]. She continued as County Organizational Secretary until 1949 when she became County Chairman, a position she held at the time of her indictment [Ex. 321, R. 1540; R. 3837; R. 6629-36, GA 289-92; Exs. 645, 640, 641, R. 4520; Ex. 644, R. 4521; Ex. 642, R. 4523; Ex. 643, R. 4522; R. 4519-22]. She also continued as a member of the State Board [Ex. 398, R. 3838, R. 3839-40].

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[40]Generally known and referred to as Dorothy Healey.

In 1936, petitioner attended "underground meetings"[41] of the Young Communist League in Los Angeles [R. 5976; GA 262-4]. Respondent offered no evidence as to what occurred there.

In 1945 she attended the National Convention at which the Communist Party was reconstituted [R. 2038, GA 44]. What, if anything, she heard, said or did at that convention is not disclosed. Upon her return to California she attended the State Convention at which "She spoke and said that the future of the party will be militant, we urge mass demonstrations at the City Hall, . . . Communist meetings on street corners, . . . shop gate meetings, . . . re-education of all Marxists and recruiting of trade union members, . . . picketing of the homes of Congressmen who do not vote Communist Party approved legislation . . . concentration of recruiting in the basic industries" [R. 3862-4, GA 130-1]. She also said in substance that "the labor movement was plunged into the postwar period without any planning," that "there should be a special session of the state legislature," and that "there should be a demand for severance pay to all workers who were laid off as the result of the government cancellation of the contracts." So many people at this Convention said that "the most important task facing the country was reconversion" that the witness could not remember whether this petitioner made such a statement [R. 4076-9].

In the same year, as the highest functioning officer available, she met with a group to "try to straighten out" what the witness referred to as "a party disruption with-

[41]The fact that Party meetings were illegally attacked by the police was conceded by respondent's witness [R. 5893-5901].

in our group" but the nature of which the record does not indicate [R. 3835-6, GA 124].

Later in 1945 she spoke at a Los Angeles meeting in support of a report on labor which urged that at the end of the war the unions should "reclaim their right to strike," with the proviso that strikes should "be used only as a last resort, a type of struggle that needs careful and solid preparation, that should be decided upon only when the chances of victory are reasonably good and must be guided by a sane, firm and resourceful strike strategy, such as has been taught us in the past by one of its greatest exponents and masters, Comrade Foster" [Ex. 329, R. 3926; R. 4079-81].

In 1946, she spoke at another meeting in Los Angeles at which, according to the testimony of the same witness, she said that "trade union leaders are to be Marxist-trained, that all strikes in basic industries must be Communist-led and, from time to time the County Communist Party Board should be consulted as to its progress or success of these strikes" [R. 3881-5, GA 133].

In 1947 she spoke at a Los Angeles meeting and emphasized the importance of concentrating on recruiting of industrial workers in the basic industries [R. 6859-62, GA 305-6]. The same year she also spoke in Los Angeles at a May Day meeting and at one attended by Henry Winston (alleged in the indictment to be a co-conspirator) but there is no evidence as to what was said at either meeting [Ex. 407, R. 3939; R. 1336-50, GA 31].

In 1948 she attended State Board meetings in San Francisco [R. 5447-50, GA 231]. The same year she spoke at a meeting in Los Angeles and urged the re-

registration of as many Party members and recruitment of as many new members as possible, and of labor union members with special emphasis on trade union leaders, and of factory workers and people in a position to assume leadership in the Party. She urged Party members to join Independent Progressive Party clubs and to get non-Party people to join also [R. 4979-86, GA 186-90]. She attended a meeting called for the purpose of dividing a section of the Party [R. 6629-32, GA 289-90] and a section meeting at which she was elected as a delegate to the State Convention [R. 6633-4, GA 291].

At the 1948 County Convention she gave a main report dealing with such matters as the growth of the Party and its organizational set up; she urged that socialism could be achieved "only with the working class in the leadership" and therefore proposed concentration on recruiting workers and particularly those in the industries and unions which had the most influence among workers. She also urged more activity among community groups, including particularly "in fighting against police brutality, discrimination and for civil rights for the Mexican-American people" [Ex. FO, R. 5153]. Also, in 1948 she attended a regional meeting in Los Angeles but what occurred there does not appear in the record [R. 2812-13, GA 92].

In 1949 she attended a National Committee plenum in New York and there, according to the testimony of the witness John Lautner, he demonstrated and gave her a sample of a small hand mimeograph machine designed for "underground work," in the event that the Party was outlawed, and printers refused to print any Party material, to be used in campaigns by the Party "to fight its way back to legality" [R. 2274-97, GA 64-9; R. 2547-67].

She spoke at a public Party meeting in Los Angeles in 1949, but what she said was not disclosed [R. 6633-6, GA 291-2]. In 1950 at a Los Angeles Regional meeting she spoke "against the Mundt-Ferguson bill, and she read a letter of Foster congratulating the Los Angeles Communists in their work" [R. 2815-16, GA 94]. The same year, at a "Stockholm Peace Appeal convention," she "spoke on the jailings of the Hollywood ten" [R. 2816-17, GA 94-5] and later she was present at a People's World Circulation Drive Rally [R. 2819-20, GA 95-6].

Ben Dobbs.

Petitioner Ben Dobbs was connected with the Young Communist League from 1932 to 1945 [R. 547-8, 870-2, GA 11; R. 5502-4, 6136-7]. In 1936 he was a member of the California State Central Committee of the Communist Party [Ex. 549, R. 4586, GA 458]. He registered as a Communist for voting purposes in 1938 and 1948 [Ex. 634, R. 4576, GA 456; Ex. 559, R. 4530, R. 4529, GA 452]. In 1939 he was executive secretary of the Los Angeles County Young Communist League [Ex. 611, R. 5592, R. 5591-3]. In 1945, 1946 and 1948 he was trade union director or chairman for the Party in Los Angeles [R. 548; Ex. 407, R. 3939, R. 3937-9, GA 137; R. 6629-31, GA 289-90]. In 1949, 1950 and 1951 he was the Los Angeles County Organizational Secretary [R. 3550-1, GA 108-9; R. 6636-40, GA 294; Ex. 642, R. 4523, GA 451].

Petitioner Dobbs was shown to have been present at the following meetings with respect to which there is no evidence in the record of what he said or did: a conference of the Young Communist League in 1932 [R. 5502-4]; a discussion group of that League in 1933

[R. 5505-6, GA 243]; a meeting of leaders of the same group in 1936 [R. 5526-7, GA 247]; a state meeting of the League in 1938 [R. 5543, GA 250]; between 1944 and 1948 at least fifty meetings at the State Headquarters of the Party in San Francisco [R. 7796-7, GA 368];[42] in 1946 two public meetings in Los Angeles, at one of which co-petitioner Schneiderman spoke and at another of which petitioner Yates spoke [R. 3886-3904, GA 133-6]; in 1946 at "at least a couple of county conferences" [R. 6865, GA 306-7].[43]

There were a number of meetings as to which there was some evidence concerning the nature of petitioner's activity: In 1939 he spoke at a meeting in Oakland but the witness could not recall what he said [R. 3549-51]. About 1946 he spoke at fund raising campaigns, but the record is silent as to what he said [R. 3939-40, GA 137]. He was announced as chairman of a May Day Rally in 1947 but the record furnishes no further information on this incident [Ex. 407, R. 3939, R. 3937-9].

In 1948 he spoke at a Los Angeles Party Press School and instructed those in attendance to read from pages 148-9 of the "History of the Communist Party of the

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[42]This testimony was given by the witness Van Dorn [see pp. 32-37 *supra*.] Though the witness stated she saw Dobbs more than 20 times during the latter part of 1945 and early 1946 [R. 7984], her recollection was refreshed by showing her a certified copy of the honorable Army discharge [Ex. HQ for Identification] which showed that Dobbs was inducted into the Army on April 1, 1942 and was overseas from the *5th of February, 1945 to February 26, 1946* [R. 7986]. The witness Van Dorn conceded that she could not have seen him during the period she had previously referred to in her testimony.

[43]He was also named by respondent's witness Saunders as having been present at a 1945 Party convention, when as a matter of fact he was in Europe serving in the armed forces [R. 870-5].

Soviet Union" [Ex. 28, R. 1362] dealing with the role of the Communist paper "Pravda" in Czarist Russia and during the October, 1917 revolution. The witness testified that petitioner compared the role of Pravda with the People's World and said that every club should have "organizations set up to provide as Pravda had done for the distribution of literature from hand to hand, if necessary, or in any other method that we were able to do in the event that the Communist publications themselves were no longer allowed in this country." Dobbs was also reported to have said that it was necessary to build the press so that "even if there was no outlawing of the Communist Party, that it would be granted widespread recognition and acceptance, or at least a reading, if not acceptance, by those people to whom they were able to distribute it" [R. 5010-20, GA 192-6]. All of the issues of the People's World were available and approximately 68 issues were introduced into evidence (10 by respondent[44] and 58 by petitioners).[45] There was nothing in any issue which suggested or could reasonably

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[44]Ex. 159, R. 687; Ex. 159a, R. 5302; Ex. 375, R. 2873; Exs. 707, 709, R. 5302; Ex. 710, R. 5304; Ex. 714, R. 5530; Ex. 736A, R. 8060; Ex. 737, R. 8070; Ex. 749, R. 11,599.

[45]Ex. D, R. 961; Exs. AK, AL, AM, AN, AO, AP, AQ, R. 1883; Ex. DR, R. 4120; Ex. DV, R. 4259; Ex. DJ, R. 3740; Exs. DM, DN, DP, R. 4095; Ex. DS, R. 4182; Ex. DT, R. 4223; Ex. DX, R. 4295; Exs. DY, DZ, R. 4336; Ex. EY, R. 4867; Ex. EZ, R. 4893; Exs. FA, FB, FC, FD, FE, R. 4893; Ex. FF, R. 4916; Ex. FG, R. 5095; Ex. FM, R. 5106; Exs. GJ, GK, R. 6142; Exs. GL, GM, R. 6143; Ex. GA, R. 5923; Ex. GE, R. 6027; Ex. GT, R. 6208; Ex. GY, R. 6378; Ex. GZ, R. 6394; Ex. HA, R. 6432; Ex. JM, R. 10,349; Ex. JR, R. 10,423; Ex. JS, R. 10,434; Ex. KA, R. 10,593; Exs. KD, KE, KF, R. 10,601; Ex. KH, R. 10,616; Exs. MG, MH, MI, MJ, R. 11,076; Ex. MO, R. 11,833; Ex. MP, R. 11,836; Ex. MQ, R. 11,839; Exs. MU, MV, MW, MX, R. 11,769.

be construed as suggesting the overthrow of the Government by force and violence.

Petitioner spoke at a meeting in 1948, the purpose of which was to divide a section into two parts but the record is silent as to what he said on this or any other subject [R. 6629-30, GA 9289-90]. In the same year he spoke at a "functionary meeting" in Los Angeles on the subject of the People's World; he urged support of the paper through reading it, fund donations and the obtaining of subscriptions. According to the witness petitioner stated that in the "History of the C.P.S.U." [Ex. 28, R. 1362] there is a whole chapter "devoted solely to the organization of Pravda, the Russian Newspaper"[46] which deals with both the legal and illegal existence of the paper; that Pravda was used to disseminate information and instructions and the People's World "had a similar purpose over here" [R. 4982-9, GA 186-92]. From the numerous exhibits in evidence it appears that the only "instructions" issued by the People's World related to such matters as registration and voting and support or opposition to legislative programs and policies of the executive branch of the government through the usual democratic channels such as letter writing, delegations, testifying before committees, distribution of leaflets, mass meetings, adoption of resolutions by organizations, etc. [R. 1883-6, App. Item 22, pp. 131-3; R. 4098, R. 10,350-1, App. Item 82, pp. 332-4; R. 4337, 5199-201, App. Item 27, pp. 144-5; also see n. 44, 45, *supra*].

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[46]There is no such chapter in this book, although there are a few pages (149-54) in this twelve chapter, 360 page book, dealing generally with the subject of "Pravda."

He spoke at a "functionaries" meeting in Los Angeles in 1948 but what he said does not appear [R. 5152-6]. The same year he made a report at a County Convention in which he advocated that labor should fight for wage increases, expose "profiteering," adopt a program of "unity down below," support Wallace for president, increase electoral activity in support of progressive candidates, struggle for the job and other rights within and outside of the unions of Negro and Mexican-American workers and against chauvinism and anti-Semitism, give special attention to the problems of youth, campaign to repeal the Taft-Hartley law and implement a program to increase the "working class base" of the Party [Ex. FO, R. 5153].

He was the main speaker at the 1949 Lenin Memorial meeting chaired by Steinberg, which was called to "Demonstrate for the Bill of Rights" and to protest the proscution in the *Dennis* case (p. 50, *supra*). The record is silent as to what anyone said at that meeting [R. 8066-75, GA 207-11]. Also in 1949 he chaired a public meeting at which petitioner Healey spoke [R. 6634-6, GA 291-2] and he spoke on an undisclosed subject at a meeting in Oakland on the 32nd anniversary of the Soviet Union [R. 3550-1, GA 108-9].

In 1950 he spoke at a "functionary" meeting on the Daily People's World fund and subscription drive and discussed club quotas with relation thereto [R. 6636-40, GA 292-4] and at an election rally where he supported the drive for the People's World and protested the jailing of Eugene Dennis [R. 2825-6, GA 98].

Aside from positions held by petitioner and attendance at meetings there is the following evidence relating to

him. One of petitioner Dobbs' activities was promoting a sports project on the waterfront including a place of recreation for seamen. As a representative of the Young Communist League in 1936, he attended several San Francisco waterfront Party meetings to help the project get started [R. 1231-3]. In 1950, a witness saw petitioner at petitioner's home where he had been sent to meet some other persons who would take him to a class of the Marxist Institute [R. 2822-3, GA 96-7].

Ernest Otto Fox.

In 1935 petitioner Fox was a "working organizer" for the Communist Party in Seattle [R. 544-5, GA 10]; in 1947 and 1948 he was chairman of a San Francisco Club or Branch of the Party [R. 4395; R. 6594-96, GA 285]; he then became chairman of a section, a position which he held until the latter part of 1949 when he became "waterfront organizer" [R. 6588, GA 283; R. 6611-14, GA 288] and in 1950 and 1951 he was San Francisco "Maritime Section Organizer" [Ex. 177, R. 2831; Ex. 181, R. 2832, GA 579].

When petitioner was nominated for club chairman in 1948, he was not elected because of the fear that it might "endanger" his "citizenship status." About two weeks later it was announced that "the county severely criticized the position that was taken" and that "Ernest Fox would be chairman" [R. 6593-6, GA 285].

There is evidence that in 1948 petitioner maintained a complete set of the "Little Lenin Library" in his home, which he said he had received when he was a delegate to a convention [R. 6615, GA 289].

The record shows petitioner's attendance at the following Party meetings, with respect to which there is no

other evidence: in 1936 a trade union caucus in San Francisco [R. 5539, GA 249]; between 1944 and 1948, eighty to one hundred meetings at the Party headquarters in San Francisco [R. 7787, 7792, GA 364, 366]; in 1946 an executive committee meeting of a San Francisco Club [R. 4394]; an unspecified number of state or county board meetings in San Francisco in 1948 [R. 5444-8, GA 228-31]; a convention in New York on some unspecified date [R. 6601-3].

Among the witnesses testifying concerning petitioner Fox was William M. Foard, who, as a member of the Party, was closely associated with the "leftists" who were expelled because they insisted that the Party should press for socialism now, regardless of the wishes of the majority of the American people (see pp. 40-43, *supra*). He testified to the meeting attended by petitioners Yates and Fox at which petitioner Fox stated that the time for militant action had not yet arrived [see pp. 30-31, *supra*, R. 4381-6, GA 148-50]. On another occasion, at a union meeting, the witness Foard spoke against having the union march on Labor Day, at which time petitioner Fox made a speech attacking his position. The witness "resented the underhanded way in which the motion was put to a vote" and "his [petitioner's] attack on me . . . in the presence of four or five thousand men" [R. 4720-3].

At a "section" meeting in 1948 petitioner urged "the necessity of better Communist Party organization" [R. 6590-3, GA 284-5]; on some unspecified date he attended a National Communist School at which "every security measure was taken when he arrived there" [R. 6599-6001, GA 286].

In 1950 he wrote an article entitled "Weaknesses in Our Maritime Work" which was published in a state "preconvention discussion bulletin" wherein he criticized "right opportunistic tendencies" in the maritime industry "which are expressed in resistance to developing a fight around basic political issues, underestimation of the militancy of the rank and file, and a desire to stick to simple trade union problems." He advocated the development in the maritime unions of a fight for peace and around such issues as the recognition of China and its seating in the United Nations, the collection of signatures for the Stockholm peace petition, the exposure of the Government's "screening program as part of the whole drive towards war and fascism" and as raising "the false issue of 'Communism,'" and "the struggle for Negro rights and jobs . . . against white chauvinism" and for "Negro-white" unity [Ex. 181, R. 2832, GA 579]. The article was republished in a similar bulletin circulated in 1951 [Ex. 177, R. 2831, GA 579].

Rose Chernin Kusnitz.[47]

In 1943 petitioner Chernin was Section Organizer of the Bronx Section in New York [R. 7088-9, GA 317]; in 1948 she was Organizational Secretary, 66th Assembly District, Los Angeles [Ex. 182, R. 2833, GA 581-2]; in 1949 she was, first, Section Organizer of the West Jefferson Section and later Organizational Secretary of the Midtown Division in Los Angeles [R. 7753-5, GA 356].

Petitioner is shown to have been present at the following Party meetings, where so far as the record shows, she said and did nothing: in 1945 the New York State

[47]She is generally known as Rose Chernin.

Convention [R. 2036, 2038-9, GA 45]; in 1946 one public meeting at which co-petitioner Schneiderman spoke [R. 3886-9, GA 133-5] and another at which petitioner Yates spoke [R. 3902-4, GA 135-6]. In 1950 she chaired and collected funds at a "Midtown Division Meeting" held in connection with the "People's World Fund Drive" [R. 7755-6, GA 356-7].

Prosecution witness Scarletto testified that in September 1951 he saw her at a meeting of "an organization she was the chairman of for protection of the foreign born" on "Third Street near Hill, upstairs" where "they had some discussion what they were going to do about some of the Communist members they had up for deportation or something," and that "she was organizing branches of all nationalities from the I.W.O. at that time to keep the ones that were being accused of something [the witness did not recall what] from being deported" [R. 2830-1, R. 3316-19].[48]

In 1943 she spoke at a club meeting in New York "in reference to increasing the membership of the particular club in the particular area. She said something to the effect that because of the war the women would have to take a more active role in the Party activities since the men must of necessity join the armed forces" [R. 7088-9, GA 317].[49]

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[48]The complete falsity of the testimony of Scarletto was conclusively established when the prosecution stipulated that Mrs. Kusnitz at the very time in question and during the period from July 26, 1951, until December 8, 1951, was in the Los Angeles County Jail because of her inability to raise the extremely high bail then set in this case [R. 3319].

[49]Teresa M. Scagnelli, the witness who testified to this incident, was a police officer from the City of New York who was brought by respondent from New York to Los Angeles to furnish the foregoing evidence. She gave no other testimony [R. 7087-91].

In 1948, she authored an article published by the Party's State Committee in a "Preconvention Discussion Bulletin" on the subject of "Party Building and Fight for Negro Rights" in which she related the following with respect to "her section" which was located in the 66th Assembly District in Los Angeles: the section had grown in membership despite the difficult times; prior to the last registration of members it "had not yet recovered from the revisionist period which blunted and stunned its fighting qualities"; this lack of recovery was evidenced by a failure to "carry on sufficient independent activity in its own name, in defense of the rights of the people"—such as F.E.P.C., for housing, against police brutality, against segregation and "jimcrow"; neither was it clarifying the issues, such as the meaning of the Marshall Plan or the danger of war; the section operated with large clubs of about 150 each; membership meetings were "dull" and badly attended; "educationals," sale of the press and literature and leadership were all poor; "white comrades" revealed "a concealed form of white chauvinism" by their lack of "confidence in the ability of Negro Comrades" and the failure to help them assume leadership; the foregoing problems were faced "boldly . . . in the spirit of self criticism"; the Section proceeded to develop "the independent role of the Party" by engaging in a "struggle for jobs in the Safeway Stores and Bank of America in our community," by holding open air meetings regularly, by bringing forward new leadership, by improved educationals, by visiting and reporting on activities of the Club to members and providing transportation and bringing them reading material; as a result a healthier situation developed; inactive members were brought back into activity and back dues, in some cases "token dues,"

were collected; a quota of 75 recruits was undertaken for the "Party Building Drive"; a conference of women was held at which were discussed the "high cost of living, child care and recreation centers, over-crowding of the schools and the increasing unemployment of women"; a workers' conference was held at which were discussed the "struggle" for wage increases, the Taft-Hartley Bill, the discrimination in employment against Negro workers and the necessity that white workers "conduct a struggle for the rights of their Negro fellow workers"; smaller clubs were organized resulting in "improved contact with our members"; and sales of the People's World increased. Petitioner advocated a harder fight by Party members for Negro rights, on the job and off, against restrictive covenants, more study of Negro history, improved social relationships and the affording of opportunities for leadership to "Negro comrades" [Ex. 182, R. 2833, GA 581-2].

Carl Rude Lambert.

In 1935, petitioner Lambert "was the one responsible for the security of the party"[50] and in connection therewith discussed with a witness disciplinary charges which had been brought against the witness [R. 5441-2, GA

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[50]One of the respondent's witnesses defined petitioner's functions in this regard in the following way: ". . . the only word I know is underground, that is, protecting themselves against the possibility of taps on telephone, by not meeting in the same home two or three times in a row, breaking up clubs into small mobile units, not using the telephone for conversations that concern the Communist Party, things of that sort" [R. 1331-2, GA 28]. Another witness of respondent, who testified concerning petitioner's attendance at "underground" meetings in Los Angeles, admitted that at and prior to the time of the meetings, the Los Angeles Police Department did not permit open meetings of the Party; it broke up actual or suspected Communist meetings, using tear gas, arresting persons in attendance, holding them in jail for a time and then releasing them without charges [R. 5890-7]. For further discussions of the evidence on this subject see pp. 37-38, *supra*.

249-50]. He had similar responsibilities in the period 1945 to 1950 [R. 4386-9, GA 150-2; R. 5461-70, GA 235-8; R. 1330-4, GA 27-8; R. 7617-22, GA 328-9; R. 7664-8] which in 1945 were carried out under the title "Head of the Control Commission . . . which is supposed to protect the membership from any infiltration of informers, stool-pigeons, enemies of the working class, spies, saboteurs, or what have you" [R. 556-7]. In 1939 and 1942 he was Financial Secretary of District 13 of the Party [Exs. 574, 572, R. 4501, GA 446]; in 1944, Administrative Secretary of the Party in San Francisco [Ex. 563, R. 4513, GA 448]; in 1949, California State Financial Secretary [Ex. 564, R. 4509, GA 447; Ex. 623, R. 4527, GA 451-2]; in 1944 and 1945 he had a desk at the State headquarters of the Party [R. 7787-8, GA 364].

The record shows the attendance of petitioner at the following Party meetings concerning which there is no other evidence: unspecified "underground meetings" in Los Angeles in 1936 [R. 5976-7, GA 262-3]; State and County Board meetings in San Francisco between 1944 and 1948 [R. 7771-8, GA 358-60]; in 1945 the State Convention [R. 615-6, GA 12-13]; and about two dozen meetings of the State Board between 1947 and 1949 [R. 5437-47, GA 224-30].

In 1945 he attended the "Mother Bloor" reception to which the witness Daisy Van Dorn testified (see pp. 32-36, *supra*). There is no evidence that petitioner said or did anything at the reception or that he discussed it with any one at any time [R. 7813-23, GA 369-72; R. 7989-8004, 12,113-17, 12,127, 10,841-9]. In 1946 he attended a Party meeting at which certain "leftists" were expelled because they set up their own "caucuses".

and opposed the Party's position toward the Machinists strike (see p. 30, *supra*). At this meeting as "the head of the security committee of the party . . . he spoke out against these persons and accused them of anti-party activity, of allowing rumors and stories to get into the hands of the commercial press and various anti-labor elements" [R. 4386-93, GA 150-3]. In 1947 he attended the meeting at which co-petitioner Schneiderman spoke on "left sectarianism and deviations" (see pp. 41-42, *supra*). There is no evidence that petitioner Lambert said anything [R. 4373-80, GA 144-7].

In 1947 he spoke at a club meeting on the subject of security; he related the histories of certain persons expelled from the Party and he warned the members present that there were F.B.I. plants within the Communist Party, that the F.B.I. was tapping their telephones and he believed that their mail was being tampered with; he went on to tell the members how to protect themselves from those F.B.I. informers and how to take certain precautions to keep their conversations from being picked up by wire-taps [R. 5464-70, GA 235-8].

In 1948 he attended a meeting at which petitioner Healey spoke on the subjects of recruiting and of the third party (see pp. 60-61, *supra*). It does not appear that petitioner Lambert said or did anything at this meeting [R. 4979-86, GA 186-90]. The same year he attended a County Board meeting in San Diego at which he was given "the thinking of members of the county board on the individuals involved in the factionalist movement that had arisen in the San Diego party." Petitioner is reported to have said that "it would be best to expel such people from the party, even though there might be

a possibility of their being sincere about their criticisms" [R. 1330-4, GA 27-8].

The witness Vernon Sutherland testified to two alleged incidents concerning petitioner Lambert. The witness became a member of the Communist Party in 1943 at the request of the F.B.I. and for the purpose of acting as an informer [R. 7611-15]. His pay as a beginner in this business was $25 a month but he worked his way up to $150 a month [R. 7653-7]. His total compensation for the period of seven years during which he was employed as an informer was $6,044.93 [Ex. NA, R. 12,156, 12,155-62], an average rate of over $860 a year and in excess of $70 a month. His testimony was limited to the two meetings involving petitioner Lambert.

The first meeting was that of a Party club in the Community of Chico, California, in 1949 participated in by petitioner for the purpose of settling a dispute between two members concerning union activities [R. 7615-7, GA 327].

In 1950, petitioner attended a meeting at the same club, called for the purpose of considering charges against the witness Sutherland. Specifically the witness was charged with attempting to cheat a Negro out of a piece of real estate for the sum of $250, with lying about Negroes allegedly refusing to sign certain petitions, with attempting to hire a Negro to dig a cesspool for 75 cents an hour, with carrying a gun while distributing Party leaflets and other charges that the witness could not recall. The witness asserted that the charge concerning cheating of a Negro on the sale of a house was inaccurate as to the amount involved. He stated that the charges were finally "trimmed down" to "chauvinism," which the witness understood to mean "prejudice against the Negro

people." The witness further testified that the Communist Party condemned chauvinism and that it was common practice for it to expel persons guilty thereof. He denied the gun carrying charge but admitted that, because it was believed to be true, he was severely criticized. [R. 7664-8].

At the Chico meeting considering these charges, petitioner "stated that the state board or some state officials in the state office had recommended I [the witness] be expelled." It was after this, according to the witness, that the following discussion took place: Someone inquired of petitioner as to the reason for such drastic action and petitioner replied that "they were purging the party for [*sic*] membership for emergency or revolution"; the witness claims that he then asked "Are you really planning revolution by bullets instead of ballots?" and that one, Hursel Alexander, replied "Just what the hell do you think we are purging the party for?" [R. 7617-20, GA 328-9]. In the entire record there is no intimation of "planning" of a "revolution by bullets instead of ballots," except on this one occasion in a question put by an F.B.I. informer in the process of being expelled on the charge, among others, that he carried a gun.[51] Even if such a conversation took place in Chico, California, under such unique circumstances, there is nothing in the record to indicate either that petitioner construed Alexander's question as asserting support of a "revolution by bullets" or that he approved such a view if the remark were so construed.

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[51]Under the circumstances where the witness was being "purged" for carrying a gun, the posing of the question as to the reasons for the purging seems to point to the conclusion that those who believed in violence were being cleared out of the Party precisely because it did not believe "in a revolution by bullets instead of ballots."

It should be noted that this is the only incident of any kind or character occurring during the three year period within the statute of limitations tying any petitioner in, even by mere presence, to any discussion involving the question of violent revolution.[52] As a matter of fact as to most petitioners there is no such evidence relating to any period of time.

Albert Jason Lima.

Petitioner Lima registered for voting purposes as a Communist in 1940, 1943 and 1946 [Exs. 527, 528, 537, 539, R. 4534-5, GA 452]. In 1940 and 1942 he was a member of the Party's State Central Committee [Ex. 520, R. 4587 and Ex. 553, R. 4585, GA 458]. In 1945 and 1948 he was a "field organizer" for the Party [R. 553-4, GA 12; Ex. 315, R. 6729; R. 6717, 6723, 6728-9]. From 1945 to 1948 he had office space at the Party's San Francisco offices [R. 7885-7, GA 362-4]. In 1946 and 1947 he was a member of the National Committee of the Party [Ex. 650, R. 2110-12; Ex. EA, R. 4345]. In 1947 he was the California chairman of the Party's Veterans Committee [R. 1316-18, 1327-9]. In 1950 he was chairman of the East Bay Region of the Party in California [R. 3561-2, GA 109-10] and a delegate to the State convention [R. 3668-70, GA 114].

Petitioner attended the following Party meetings with respect to which there is no evidence as to what, if anything, he said or did or the length of his presence or extent of participation; two State conventions and the National Convention in 1945 [R. 554, GA 12; R. 458-9,

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[52]Nowhere in the record is there any showing that any petitioner at any time stated a belief in violent revolution.

2034, 2037, 621-2]; the 1946 meeting at which co-petitioner Schneiderman and petitioner Lambert spoke on charges against the "leftists" (see pp. 73-74, *supra*); [R. 4386-93, GA 150-3]; the 1947 meeting at which co-petitioner Schneiderman spoke on "left sectarianism" and "right deviations" [see pp. 41-42, *supra;* R. 4376-81, GA 145-7]; between 1947 and 1949 approximately two dozen State Board meetings in San Francisco [R. 5439-49, GA 224-30]; and a veterans caucus in San Jose in 1947 [R. 1317-18, 1327-9].

In 1940, petitioner was a candidate for Congress on the Communist Party ticket [Ex. 580, R. 4559]. He was advertised as the main speaker at a Party "May Day Rally" in 1947 [Ex. EA, R. 4345]. Whether he actually spoke and if so what he said was not the subject of evidence. The same year he met with several people in San Diego and participated in a discussion which dealt with the political situation—"specifically with the need for thought in regard to the coming campaign of the Independent Progressive Party" [R. 1325-7]. In 1950 he attended the Party's West Oakland Convention, where he gave a "short talk . . . on the necessity of recruiting" [R. 3661-69, GA 110-12], and a meeting called for the purpose of electing delegates to the State Convention, where he "made a talk" the first day and on the second day was "in charge of the proceedings more or less." What he said or did is not disclosed [R. 3571-3, GA 112-3]. And he was a speaker at a meeting advertised under the slogan "No More Wars to Save Jim Crow," the record again being silent on the content of his speech [Ex. CR, R. 3700, 3749-50].

Frank Efroim Spector.

A publication of the Los Angeles Communist Party entitled "Two Decades of Progress" covering the period from 1919 to 1939 refers to petitioner Spector as a "pioneer leader of the Party in Los Angeles" [Ex. 611, R. 5592]. From 1936 to about 1940 he was San Francisco County Organizer or Secretary [R. 466-8; R. 552-3, GA 12; R. 447-50, GA 5-6]. In 1950 he was the Los Angeles County Southern Division Organizer [R. 6636-8, GA 292-3].

The following meetings were attended by petitioner, with respect to which there is no evidence as to what was said or done: in 1935 a number of Young Communist League State Committee Conferences [R. 5508-11]; Party "underground" meetings in 1936 [R. 5976-7, GA 262-3]; in 1945 a club meeting of the Communist Political Association [R. 6865, GA 307].

Petitioner was in Moscow in 1935, but there was no evidence allowed to stand in the record to indicate anything that he did or said there [R. 7684-8, GA 332]. In the same year he spoke at a San Francisco meeting of the State Committee of the Young Communist League. The record is silent on what he said [R. 5508-9, GA 243-4]. In 1937 he attended two meetings of District 13 of the Party. At one there was severe criticism of the "Western Worker" for publishing a "Trotskyite" editorial concerning "the Minneapolis teamsters' strike" [R. 447-50, GA 5-6]. At the other an outline, reading material, curriculum and recommendations for financing of a Party school were approved. No details of what was said appear in the record [R. 463, 477-80].

In 1940 or 1941 he objected to the Party barring aliens from membership and asserted that he would fight for his right to remain a member [R. 2039-43, GA 45-6]. In 1946 he attended a public meeting at which petitioner Yates spoke on foreign affairs [p. 31, *supra;* R. 4334-8; 3902-4, GA 135-6].

The witness Samuel Davenport Russell, who testified to incidents involving the petitioner Spector, joined the Party as a paid F.B.I. informer in May, 1945 [R. 6825-7]. From June, 1945 until, after September, 1947 when he lost his job with the F.B.I. he had no other employment than that of an informer and it was his sole source of income [R. 7000-1]. His initial compensation was five dollars a month but he was given successive raises until his earnings were ninety dollars a month. When he received increases he "was commended for turning in fairly good reports" [R. 6968-9]. His total compensation from 1945 to 1947 was $1,669.94 [Ex. NA, R. 12,156, 12,155-62]. For this compensation his work consisted of the turning in of names of people with whom he pretended to be friendly, of literature which he obtained in the Party and of numerous oral and written reports. He kept copies of the reports, in violation of instructions from the F.B.I. because he thought that he might write a book and he hoped to make money out of it [R. 6523, 6972-6, 6981-91, 6998-9, 7037-8].[53]

According to the witness Russell, in 1945 and 1946 petitioner conducted classes at a Party club. At one of these classes he assigned for reading the chapter called

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[53]At this time the witness was interested in the field of fantasy in literature and was a member of the "L. A. Science Fantasy Society" [R. 6991-3].

"The Party" in "Foundations of Leninism" by Stalin [Ex. 1, R. 1357] and the pamphlets "Mastering Bolshevism" by Stalin and "The United Front Against Fascism" by Dimitroff [Ex. 119, R. 660]. The witness "recalled" in May of 1952 the exact pages of "Foundations of Leninism" to which petitioner had referred in 1946 and the respondent read to the jury portions of those pages dealing with the writings of Lenin relating to the "Russian Revolution." The reading selected by the respondent stated that "Lenin restored the revolutionary content of Marxism, which had been immured by the opportunists of the Second International"; that "he also took a step forward, developing Marxism further, under the *new conditions*[54] of capitalism"; that "Leninism is the theory and tactics of the proletarian revolution . . . and . . . of the dictatorship of the proletariat"; that Lenin "pursued his activities in the period of developed imperialism, in the period of the unfolding proletarian revolution"; and that "Leninism emerged from the proletarian revolution, the imprint of which it cannot but bear" [R. 6865-72; R. 6882-92; R. 3887-3902, GA 135-6]. The witness did not testify that in referring to this reading material or otherwise, the petitioner said anything about the overthrow of our Government by force and violence. The record is completely silent as to what he did teach or advocate, aside from what the respondent would infer from the assignment of reading material. On this score, "The United Front Against Fascism" [Ex. 119, R. 660], which according to the witness was assigned for reading at the same time as the work last cited, was written in

[54]Emphasis supplied. Note this phrase in connection with the over-all reading assignment allegedly given by petitioner.

1935, eleven years after "Foundations of Leninism" was written. The Dimitroff pamphlet dealt specifically with a program for the United States, under the "new conditions" which had developed since 1924 when Stalin set forth certain general theories which he deduced from conditions as they had changed between the period of the writings of Marx and Engels and the time of Lenin's writings.[55]

The action proposed in the 1935 writing for the United States consisted of finding "ways and suitable forms of preventing fascism from winning over the broad discontented masses of the toilers," requiring for this purpose the formation of a new anti-fascist party, in the nature of a Farmer-Labor Party which, while it would be neither Socialist nor Communist, would not be anti-Communist, with a program "directed against the banks, trusts and monopolies" and for "genuine social legislation," unemployment insurance, "land for the white and black sharecroppers," cancellation of sharecroppers' and farmers' indebtedness, "equal status of the Negroes," the demands of the war veterans, and for the interests of the members of the liberal professions, the small business men, the artisans. And so on.

> "It goes without saying that such a party will fight for the election of its own candidates to local offices, to the state legislatures, to the House of Representatives and the Senate" [Ex. 119, p. 40, R. 663-5].

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[55]The witness testified that specifically referred to by petitioner were various pages of "Foundations of Leninism" between pages 10 and 33. At page 24 appears the statement that "theory is not a dogma" and that it "undergoes final formulation" only after it is "tested by the data of practice" [Ex. 1, p. 24, R. 3969].

In September 1947, the petitioner visited the witness Russell at his home and told him he was suspected "of being a police spy." The petitioner questioned Russell as to his reasons for joining the Party, his source of income, whether he had had conversations with any police agency, and what Marxist books he had read. In his answer Russell enumerated several Marxist-Leninist works and then petitioner is alleged to have said to him "that this indicated a remarkably small amount of reading for the educational director of a club" (a position held by Russell); that such a person should "be very widely read in the basic works of Marxism-Leninism in order to interpret them to the club members"[56] and that the small amount of reading he had done "was a suspicious circumstance." Petitioner, with the permission of Russell, then searched Russell's wallet and room, and he found the copies of the F.B.I. reports and notes which the witness had retained for use in his anticipated literary efforts. Russell was told to attend no more Party meetings and his career as an informer ended [R. 6910-16, GA 310-12].

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[56]That Marxism-Leninism was differently interpreted by different members of the Party is clear. The record is replete with evidence of differences of opinion within the Party on matters of both theory and practice [R. 4732-4, App. Item 39, pp. 175-6; R. 974; R. 4823-5, App. Item 40, pp. 176-7; R. 4426, 6775-7, 4155; R. 4912-5, App. Item 41, pp. 177-80; R. 2573]. The possibility of interpreting Marxist-Leninist writings differently dependent on how it is studied was also acknowledged by one of respondent's witnesses [R. 2657-62, App. Item 55, pp. 224-6]. There is no evidence that this petitioner, or any other petitioner for that matter, ever advocated or taught that the Government of the United States should be overthrown by force or violence or construed Marxism-Leninism as calling for such advocacy.

In 1949 it was announced that petitioner would teach a class on "The State" at a County "Section Leadership Training School." Whether he did so does not appear from the record [R. 6664-7, GA 297]. The same year he attended a public Party meeting at which petitioner Dobbs was the chairman and petitioner Healey spoke [see p. 66, *supra*, R. 6634-6, GA 291-2]. In 1950 he made a speech at a "functionaries" meeting in Los Angeles in which he said that there was a nationwide peace campaign and that the Communist Party had a quota of 500,000 signatures on the Stockholm Peace Pledge. He pledged 500 signatures himself and said mothers could sign for children. At that meeting the matter of a People's World drive for subscriptions and contributions was also discussed [R. 6336-40, GA 292-4].

Also in 1950 he was the author of an article in a State "preconvention bulletin." In this article entitled "On 'Subjective Reactions' and 'Political Vacations' Among Left Progressives and Trade Unionists," he criticized certain "left-progressives" for taking a "political vacation" after their International Union removed the local union's "progressive leadership." He said that because of this the employers "went on a rampage, cutting piecework prices and hourly wages and undermining conditions won over many years of struggle under progressive leadership." He said the effect of this was "to weaken the unions, destroy their fighting capacity, and chain them to the imperialists' policies of war abroad and fascism at home." The remedy recommended by him against these evils was for "left-progressives" to engage in "greater activities in the shops and unions around each demand" [Ex. 181, p. 3, R. 2832].

Loretta Starvus Stack.

In 1945 she was a delegate to the National Convention of the Communist Party [R. 2035; R. 2062, 2431-5, GA 72-3] and later that year was elected to the California State Committee [Ex. 398, R. 3836-9, GA 124-5]. From 1945 to 1948 she had office space at the Party headquarters in San Francisco [R. 7785-8, GA 364-5]. From 1945 to 1949 she was State Secretary or Organizational Secretary [Ex. 566, R. 4507; Ex. 561, R. 4509; Ex. 569, R. 4509; Ex. 564, R. 4509; Ex. 562, R. 4514; Ex. 570, R. 4517; Ex. 582, R. 4517; Ex. 576, R. 4524; Ex. 577, R. 4525; R. 1234; R. 5476-7, GA 238]. In 1946 she registered to vote as a Communist [Ex. 533, R. 4534]. In 1950 she was a member of the State Committee [R. 11,626, GA 418].

The record discloses that petitioner attended the following Party meetings but does not indicate that she said or did anything at them: a State Convention in June of 1945 [R. 3854; R. 621-2]; many meetings of "functionaries" in 1945 [R. 3946]; from 1947 to 1949, meetings of the State Board [R. 5439-46, GA 225-30].

The witness Leonard Patterson went back twenty years in his testimony concerning Loretta Stack. The witness testified that he became a Communist after he got a job "in the Communist Party headquarters, in the barber shop." He was "a very religious fellow" and didn't want to become a Communist because he thought "that Communism was red and wanted to overthrow the government." However, on a bet that if he took a beginners course in the Workers School he would not become a Communist, he took the course and lost the bet because the schooling convinced him he "ought to be a Communist" [R. 5724-5].

At the time of trial he had begun a career as a professional witness. He had testified for the respondent in about 10 cases as of that time and in several state cases at a fee of $25 per day plus $9 for subsistence plus traveling expenses [R. 5623-8].[57] When he worked for the Communist Party he received "from $5 to $15 a week" [R. 5634]. In 1942 he went to work for a government navy yard and in response to a question on the application blank as to his former employment, he did not mention his work for the Party [R. 5677-88].

The witness first talked to a representative of the F.B.I. before 1950, but he couldn't recall what year it was [R. 5648-9]. This witness "identified" petitioner as one Lottie Keith whom the witness testified he knew in 1932 [R. 5354-57]. The witness said he met Lottie Keith in 1932 when he came back from Russia "together with other young Communist League students that was going over to Russia to the International Lenin School" and that he gave "them a pep talk on what they should expect in the Lenin School" [R. 5359-63, GA 215; R. 5738].

The witness said he had a conversation with Lottie Keith in Philadelphia in 1934 concerning the Lenin School; they discussed having been "taught" street fighting and the use of automobiles and street cars as barricades "to protect the revolutionaries in their fighting" [R. 5372; R. 5760]. They also discussed "illegal work."

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[57]His expectation that he would get further employment in this field was indicated by his refusal to give a specific answer to a question because "I don't want to make a positive statement yes or no. This will bounce back some other time" [R. 5746-7].

She told him that she had learned that the duty of students on their return to the United States was to stay "legal" as long as they could; but that on an attempt of the United States Government to drive the Party underground, "the Party apparatus would be kept intact and it would function right along" [R. 5376]. The witness told Lottie Keith they would have alternate central, district and county committees in case one "gets locked up." They also discussed the use of other organizations "as a front for the Party" for functioning in time of "illegality or semi-illegality." Lottie Keith told the witness that she was taught that the dictatorship of the proletariat could come about only as a result of the overthrow of government in the respective countries; that the duty of the students was to work to overthrow their own government and to set up the dictatorship of the proletariat "as a guarantee that the government that was overthrown would not regain its power"; that all her instructors were Russian except one Britain and one American, a member of the "Central Control Commission" of the American Communist Party [R. 5363-83, GA 213-19; R. 5760-61, GA 222-3].

According to the witness, Lottie Keith then told him "that she had learned a lot from that teaching and that it was necessary in the Philadelphia district that we should start steps to put this into practice"; they then discussed "how to apply the Lenin activities to the Young Communist League" [R. 5380, 5757]. Although the witness remained in the Philadelphia district until 1937, when he "went out of the party" and during that period he "was associated with the Young Communist League, quite frequently with Lottie and her husband" [R. 5386] there

is not one word of evidence to show anything done to implement these alleged teachings.[58]

Nor is there any other evidence relating to petitioner after 1934 until the year 1945. In that year at a State Convention she made a speech in which she said "that the American workers will be the grave diggers of the capitalistic government, and she urged Marxist-Leninist rules, reinstitute them all over [*sic*]". [R. 3860-2, GA 130]. At a convention in 1946 she said that "we, speaking of the Communist Party, are the instrument through which . . . this capitalist form of government will be overthrown, and a socialist form set up" [R. 1339-41, GA 29-30]. The same year at a County Conference in Los Angeles in a speech, "she mentioned the poor housing conditions that she had to live under as an example of the sort of things one had to endure under capitalism; and said that these experiences should spur us into working for socialism in our time in the United States" [R. 6862-3, GA 306]. Also in 1946 she spoke at a San Diego meeting of "leading people" from the county on the topic; "reorganization and concentration of the party" [R. 1342].

Timothy Evans testified for respondent concerning petitioner Stack. In February of 1948 he started work-

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[58]Although the witness left the Communist Party in 1937 [R. 5648] and first became available to prosecuting agencies in 1947 [R. 5644], he never discussed this conversation with anyone between March, 1934, and January, 1952 [R. 5763], nor had he ever made any record of it [R. 5759].

ing for the State of California. At the same time his wife obtained employment with the Veteran's Administration. At the same time he was hired as an informer by the F.B.I. [R. 3661-7]. His beginner's rate of pay as an informer was $10 a month and it rose to $125 a month plus reimbursement for any substantial expenditures. For the period from February 1948 to the time of his testimony in March of 1952 he received a total of $4,086.68 as compensation for his services as an informer, an average of about $85 a month. He reported none of these earnings on his income tax returns [R. 3634-44; R. 3672-3; Ex. NA, R. 12,156; R. 12,155-62].

This witness testified that in October of 1948 speaking at a meeting, which was not a Party club meeting, in a private home in Oakland on the "woman's question" she said in "effect" that the Party "should take precedence over the family life"; that "under our society women, and particularly working women, find themselves in a very hard and difficult position"; that they are the subject of "double exploitation," as women and as workers; that Negro women were triply exploited because of the fact that they were also Negroes; that there should be equality of women and that the discrimination against Negro women, as Negroes must also be ended, that the only ultimate solution to these problems was the establishment of socialism because the exploitation of women had economic roots in capitalism; that women in this country "must take the same historic role that women played in Russia in bringing about the revolution"; that

"the exoneration of the women would only be brought about through . . . the overthrowing of the present existing economic system, not in part, but in its entirety"; that the women if necessary should make their household activities secondary and that they "should take up the necessary arms side by side with men and bring about this change so vastly needed in the government, and bring about the dawn of socialism"; that in Russia "'love of family' is not existent"; that children are well cared for "in centers" there while "the mother takes her role side by side with men" and at the end of the work day the mother gets to spend time with her child; that while socialism is the final solution to the problem of women, she was interested in taking immediate steps to eliminate or ease the conditions of women through the fight against discrimination; that it was important to do everything possible to solve the problems of women now as they arose from day to day; and that women would learn from their own experience that socialism was the answer to their problem [R. 3530-2, GA 105-7; R. 3706-19, GA 117-19].

Petitioner Yates testified that during the five year period between 1947 and 1952 she had seen petitioner Stack "quite often" but because petitioner Stack "has been working on a job at very difficult hours" it was not as often as she would have liked [R. 11,252, GA 396].

There is no evidence of any kind as to what petitioner Stack said or did within the three year period within the statute of limitations, December 21, 1948 to December 21, 1951.

Respondent's Theory—The inferences predicated upon respondent's construction of the doctrines of Marxism-Leninism.

There is no evidence of any petitioner's alleged connection with or participation in a conspiracy as charged, unless the foregoing constitutes such evidence. Nor is there any other evidence from which the issue of specific intent of each petitioner can be determined. There was no witness, like the witness Budenz in the *Dennis* case (183 F. 2d 201, 229, 232, C. A. 2, 1950), who testified that the words appearing in any document had for the defendants on trial any hidden meaning espousing force. The activities and views of each petitioner, thus fully set forth above, is the sole evidence of their adoption and construction of Marxism-Leninism and of their understanding of the purposes and objectives of the Communist Party.

Respondent introduced numerous Marxist-Leninist writings, upon proof that each of them at one time or another was circulated, read, referred to in educational outlines or assigned for reading in some division or other of the Party. Essentially the record on this aspect of respondent's case is made up of short excerpts from about a dozen books, which are themselves historical, philosophical and polemical, dealing with the nature of societies and their history from at least 1848 to the present day, written by various authors, a number of whom passed away before the dawn of the Twentieth Century.

The respondent agreed that there was "no charge here that the printing of any of the documents in evidence is illegal in and of itself" [R. 1448-50]. It was stipulated that the Communist Manifesto [Ex. 39, R. 1352], (re-

ferred to by one of respondent's witnesses as the "Party's Bible," see p. 55, *supra*), "has been published in practically every language in the world" [R. 2610-11]. The respondent did not contend that the selling of any of these books was illegal; "we know that they are being found in libraries" [R. 3463-64]. Relying upon the passages selected by it from these writings and read into the record, respondent placed its construction upon Marxism-Leninism as advocating the overthrow of the Government of the United States by force and violence, and urged the jury and the courts below to find in accordance therewith.

Upon proof that the Communist Party is founded upon the principles of Marxism-Leninism and that petitioners were members of the Party, respondent has contended throughout that it has established each petitioner's adherence to Marxism-Leninism as construed by it, *i.e.*, to mean the forceful overthrow of our Government. Petitioners have urged at all stages of the case that respondent's construction of these doctrines is immaterial and that the prosecution had the burden of proving as to each petitioner, among other things, his adherence to the doctrine of the forceful overthrow of our Government; if that ultimate fact is to be established by showing a petitioner's adherence to Marxism-Leninism, then an essential link in the chain of proof is evidence that *he, not the respondent*, construed these doctrines as embodying the forbidden doctrine.

Moreover, respondent's theory is predicated upon the proposition that by virtue of their membership and offices in the Communist Party, every petitioner knew that the Communist Party does in fact follow respondent's inter-

pretation of Marxism-Leninism and concurs therein. But the record is replete with evidence showing, as a minimum, that a belief to the contrary is clearly tenable.

Its Constitution avows the Party's adherence to Marxism-Leninism and announces its role as spokesman for the working class and its allies in the fight against capitalism. It identifies the Party's cause with the defense of American democracy and the extension of constitutional safeguards to minorities. Socialism is proclaimed as the ultimate answer to the ills of capitalism and the Party dedicates itself to educating "the working class, in the course of its day to day struggles, for its historic mission, the establishment of Socialism" to be achieved. "by the free choice of the majority of the American people" [Ex. 21, R. 1518; R. 5114-16, R. 10,568-9, App. Item 14, pp. 114-116]. It provides for the expulsion of any member advocating force and violence (see p. 47, *supra*).

It appears without contradiction from the testimony of respondent's witnesses that this Constitution "was handed to every Communist member" when he "entered the Party"; applications for membership had the preamble to the Constitution printed on them and the Constitution was generally distributed to the members of the organization [R. 4925-6; R. 5091; R. 1710; R. 1517].

Aside from the Constitution, there is evidence of other official statements of the Communist Party eschewing the use of force and violence [R. 1161; Ex. FG, R. 5095; R. 5121-5; Ex. KI, R. 10,622, R. 10,621-3].

The basic policy resolution, adopted at the convention in 1945 at which the Communist Party was reconstituted

and thereafter published in Political Affairs,[59] defines the issue then facing the nation, not as the choice between socialism and capitalism, but rather whether democracy and peace will prevail against fascism and war. It advocates the widest democratic coalition behind a program designed to assure democracy and peace. A program to ensure a durable peace and preserve friendship and cooperation with the Soviet Union, eliminate discrimination of all kinds based upon race, color, creed and national origin, preserve and extend the rights of labor to organize and bargain collectively and protect the economic security of the people was advanced as one to meet the "urgent immediate practical needs" of the "working class and the people as a whole." At the same time the Party recognized that the American people do not yet accept socialism "as an ultimate goal." It resolved to carry on and promote an educational process, growing out of the effort to achieve solutions to "immediate practical needs," whereby the great majority of the American people would recognize the "need for the eventual reorganization of society along socialist lines" [R. 2458-72; Ex. 55, R. 1582; R. 1928-9, App. Item 15, pp. 116-117].

The official utterances of the Party repeatedly declare that socialism will be achieved in the United States only when the majority of the people desire it and then through democratic channels. There are frequent official statements to the effect that in the United States the transition to socialism will proceed along the special paths deter-

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[59]The witness Lautner, one of respondent's informers, testified that the Party's resolutions embodied its program and were "the tools to carry out and bring closer the realization of the basic aims of the Communist Party" [R. 2677]. He also acknowledged that the periodical called "Political Affairs" is a "good place to look for" the true program of the organization [R. 2673].

mined by the democratic choice of the people of this country and not by the methods followed in any other—"not by a mapped-out route, not exactly as in the Soviet Union, but by its own road, dependent on its historical, national, social and cultural circumstances" [Ex. BC, R. 2666, R. 2671; Ex. 83, R. 1582; R. 1936; Ex. 150, R. 1582; R. 1941; Ex. EU, R. 4853-4, App. Item 16, pp. 117-18; Ex. BB, R. 2666-8].

The tenable view that the Communist Party was not an advocate of force and violence is fortified by the testimony of respondent's own witnesses indicating that while they were Party members, this was their understanding. A number of these witnesses testified that as Communists they were taught and understood that the Party sought to work for the immediate improvement of conditions under capitalism and conceived of the road to socialism as requiring the winning of the majority to that objective and as necessarily following a different route than it had elsewhere [R. 1799; R. 6253; R. 1760; R. 4900-3, App. Item 18, pp. 123-5]. One such witness testified that while he was in the Communist Party he believed in the establishment of socialism for the United States; that when the people were, in a great majority, ready for socialism it was quite possible that it might be established without any violence; that there was more than a 75% chance of and he hoped 100% for such peaceful change; that if violence came it would be instigated by a minority seeking to retain power against the wishes of the majority. Many Party leaders told him that they believed these things too [R. 8542-50, App. Item 17, pp. 118-122].

In the entire record there is no declaration of the Communist Party proposing the overthrow of the Gov-

ernment of the United States by force and violence or the advocacy of that doctrine.[60] On the other hand there is a wealth of evidence, aside from the activities of petitioners discussed *supra*, which establishes that the Party continuously worked for legitimate objectives through the democratic processes. It participated as a political party in the electoral process [R. 623, R. 1160; R. 4585; Ex. 557, R. 4581-2; Ex. 555, R. 4584; Ex. 553, R. 4585; Ex. 549, R. 4586; Ex. 544, R. 4587; Ex. 520, R. 4587, GA 458]. It ran numerous candidates for public office [Ex. 580, R. 4559, GA 455; Ex. 634, R. 4576; Ex. 633, R. 4577, GA 456; Ex. 632, R. 4577; Ex. 578, R. 4579; Ex. 543, R. 4579; Ex. 526, R. 4580; Ex. 519, R. 4580, GA 457; R. 886; Ex. 199, R. 3560-1, App. Item 21, pp. 130-1; R. 1706-7; R. 961-2; R. 1348; R. 1692-3; R. 5528-9; R. 2369]. It supported candidates of other parties and consistently urged voters to exercise their franchise [R. 4159-63; R. 1883-7, App. Item 22, pp. 131-3]. It continuously developed and supported legislative programs dealing with the major problems of the times [Ex. 538, R. 4588; Ex. H, R. 1142-54, App. Item 23, pp. 133-7; Ex. I, R. 1158-9, App. Item 24, pp. 137-8; Ex. DX, R. 4295, R. 4296-4300, App. Item 25, pp. 138-42]. It called upon voters to determine their choice of candidates on the basis of the candidates' positions on such issues as peaceful world relations, defense of the Bill of Rights and of the rights of labor, the Negro people, the small taxpayers, the veterans and the farmers [Ex. 359, R. 2846; R. 3308-10, App. Item 26, pp. 142-4]. It

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[60]Of course, respondent has always contended that the Party's adherence to Marxism-Leninism constitutes such advocacy or agreement to advocate. But this argument rests upon the respondent's construction of Marxism-Leninism, not upon that of the Party, as shown in the record here.

advocated a program of friendship between the United States and the Soviet Union and the peaceful settlement by negotiations of all international problems, taking the position that "the struggle for peace is inseparable from the struggle for democracy" and that war and fascism could and should be blocked [Ex. FM, R. 5106; R. 5260; Ex. MN, R. 11,823, R. 11,834; R. 3255-6; R. 4337; R. 5199; R. 5201; R. 11,847-8, App. Item 27, pp. 144-6]. It urged labor unity and opposed the Taft-Hartley law [Ex. EA, R. 4345; R. 4350; Ex. AQ, R. 1883, App. Item 22, pp. 131-2]. It proposed a tax, unemployment compensation and housing and slum clearance program as a means of dealing with unemployment [R. 6815-18, App. Item 28, pp. 146-8; R. 1656-7]. One of its basic activities was the fight against discrimination [R. 3674, 3677-8, 3689-90, 3692-6, 3703, App. Item 97, pp. 362-8; Ex. EF, R. 4618-23, 10,607-10, App. Item 29, pp. 148-50; R. 1645-6; R. 1778-80, App. Item 30, pp. 150-3]. It concerned itself with a multitude of other problems relating to veterans' affairs [R. 1904-05, App. Item 31, pp. 153-154], foreign affairs [R. 5201; R. 5196-7, R. 1878-81, App. Item 32, pp. 154-157; see also App. Item 27, pp. 144-146], civil liberties [R. 1854-5, App. Item 33, pp. 157-159], public health [R. 1667, App. Item 34, pp. 159-160], education [R. 1708; R. 3283-5, App. Item 35, pp. 160-162], and sought their solution within our present democratic framework. It repeatedly announced its support of these democratic processes and its determination to help "curb the monopolies and check and defeat pro-fascist reaction" [Ex. EU, R. 4853; Ex. EY, R. 4867; R. 4669-70].

Respondent sought to buttress its construction of Marxism-Leninism by evidence of third party declarations

allegedly made at various Party clubs and schools—all outside of the presence and without the knowledge or approval of any petitioner. Nevertheless respondent seeks to hold petitioners responsible for these declarations. It does so in the face of uncontradicted evidence of frequent disagreements among Party members[61] with respect to the meaning both of Marxism-Leninism and of Party policies and programs (see footnote 56, p. 83, *supra*). An example of the nature of such disagreements can be found in the testimony of respondent's witness Foard who had aligned himself with the "leftists" who were expelled because, among other things, they insisted upon a program calling for socialism without regard to the wishes of the majority of the people (see pp. 41-43, *supra*). He related a discussion at a meeting of the Party club to which he and some of the "leftists" belonged at which some of the members disagreed with Foster's thesis that when the majority of the people wanted socialism, it could be achieved peacefully; that under the conditions existing in the United States a socialist revolution might be accomplished without the minority bringing about violence in an attempt to prevent the revolutionary change desired by the majority. There were others in the club who supported Foster's prediction of the possibility of a peaceful revolution [R. 4912-15, App. Item 41, pp. 177-80].[62] It has been the contention of petitioners at all times that the views of these "leftists," and others

[61]Moreover, it is not known whether the third party declarants were bona fide Party members or FBI agents, for the agents were unknown to each other [R. 6754-64, 7598-9].

[62]The same witness testified to other discussions at the same club at which the policy of the Party was criticized and at which many of the statements made were "mostly in jest"; he stated that when one of the books studied by the group referred to the revolutionary overthrow of Louis Bonaparte without violence—

allegedly making similar statements[63] could not be transplanted to any of them; that their understanding must be determined from their conduct as established in the record. Officials of the Party were not advised of what was said at various club meetings, schools or classes and they frequently disagreed with statements of which they were aware. Petitioner Yates specifically disagreed with various statements attributed to third party declarants when the alleged statements were directed to her attention during her testimony [R. 1111-20, 1136-53, App. Item 79, pp. 306-27].

"without lifting a finger"—he labelled it "merely a statement" because he decided for himself what parts of Marxism-Leninism are true and what parts are false; he conceded that the Communist Party took the position that in order to achieve the power of the state, it had to first win the majority to its side [R. 4425-8; R. 4438-40; R. 4446-7; R. 4474-5; R. 4749; R. 4781-4822, App. Item 46, pp. 188-205; R. 4900-03, App. Item 18, pp. 123-5].

[63]Such similar third party declarations included some relating to what was allegedly taught at a State Party school in 1937, by the witness Saunders [R. 1258], who conceded that when he taught schools, he received no instructions on the conduct of the schools [R. 562-3, App. Item 43, p. 184] and who left the Party in 1945 because it engaged in "endless talk of united front" instead of "talk for overthrow of the government, which I [the witness] certainly believed in" [R. 974-7, App. Item 42, pp. 180-3]; relating to what was allegedly taught at a New York Party school in 1939, by the witness Rosser [R. 5494-7, App. Item 44, pp. 184-6]; relating to what was allegedly taught at another New York school in 1941, by the witness Lautner [R. 2172, 2625, 2669]; relating to what was allegedly taught in a San Diego school in 1945, by the witness Hamlin who conceded that the outline used in the class set forth as the Party's aim "the establishment of socialism by the free choice of a majority of the American people," with which proposition one of the members of the class, expressing his own personal belief, disagreed [Ex. 626, R. 1435; R. 1784-92, 1948-9 1957-9, App. Item 45, pp. 186-8]; relating to what was allegedly taught at a Los Angeles club class in 1946, by the witness Wereb [R. 3906]; relating to what was allegedly said in 1947 at a Los Angeles club meeting and class and in 1949 at a club meeting, by the witness Litt [R. 4953-60, 4938-47]; relating to what was allegedly taught at a Los Angeles Marxist Institute in 1949, by the witness Evans, at which Institute the outline used specifically disavowed the aim of the forceful overthrow of the Government [Ex. 201, R. 2751; R. 3722-7; R. 3056-7].

Nature and character of respondent's witnesses as related to "solidity" of evidence and to requested instruction regarding consideration of informers' Testimony.

The witnesses who testified to the third party declarations as well as concerning the petitioners themselves fall into two categories, paid informers (see pp. 32, 52, 75, 80, 88, *supra*) and former members of the Party who had left it because of their disagreements with it, some of whom became professional government witnesses and consultants, an occupation which paid well (see pp. 40, 70, 85, *supra*). The witness John Lautner was expelled from the Party in 1950 at a time when he was a paid official earning $60 a week. For the next eight months he was unemployed. Then he volunteered to give information to the F.B.I. He was then hired from time to time as a "consultant" on communism and as a witness, compensated at the rate of $20 a day when he was employed by the F.B.I. and $25 when his employer was the Department of Justice. From this employment he earned $753.15 in 1951 and $3,046.55 during the first six months of 1952 [R. 2408-20; Ex. NA, R. 12,156; R. 12,155-62]. At the time he testified he had not yet made up his mind about writing a book, although he thought it a good idea [R. 2427; R. 2521-4]. The witness Honig had testified in about six or seven cases. His going rate was $25 a day [R. 8116-17; R. 8323-7].

The informers who became members of the F.B.I. at its instigation were all paid for their services (see pp. 32, 52, 75, 80, 88, *supra*). Lloyd Hamlin received $200 a month "in the form of an expense account" from 1945 until about the beginning of 1947 when he received a $50 monthly increase; he was paid $250 a month until the

time he testified in February of 1952 although he ceased functioning as a Party member in the Spring of 1951. His earnings from the F.B.I. which totalled $13,182.00 were his major source of income for the seven year period before he testified [R. 1612-19; R. 1661-7; R. 1826-8; Ex. NA, R. 12,155-62]. The informer Scarletto testified that he received $20 a month for a number of months during 1947 while he was seeking membership in the Party and that he was increased to $75.00 a month in 1951 [R. 2739; R. 3120; R. 3311-15], but it was stipulated that he was paid a total of $3,865.00—$190 in 1947, $525 in 1948, $940 in 1949, $1125 in 1950, $875 in 1951 and $210 up to the time he testified in March of 1952 [Ex. NA, R. 12,155-62].

The witness Wereb testified that he received from $25 to $125 a month (which he did not set forth in his tax returns), as reimbursement for expenses, which included "anonymous contributions" running as high as $75 made by him to the Party [R. 4018-20; R. 4024; R. 4048-9]. It was stipulated that from 1944 when he joined the Party until 1947 when he dropped out, he received $3,254, his best year being 1946 when the amount was $1,050 [Ex. NA, R. 12,155-62]. The witness Litt received his itemized expenses at first, then a flat sum of $10 a month with progressive raises to $60 a month [R. 5042-3]. The witness Lancaster testified that for his services as an informer he received $25 a month beginning in 1947 with an increase to $40 a month in 1949 which rate of pay continued until he left the Party [R. 6748-50]. However, it was stipulated that he received as such compensation a total of $3,205; $250 in 1947, $670 in 1948, $945 in 1949, $1,155 in 1950 and $80 for his services in January, 1951 [Ex. NA, R.

12,155-62]. The witness Margaret Ames and her husband were both employed as informers and each received compensation beginning at $25 a month and rising to $60 a month. Their combined total compensation was $4,-591.94 [R. 7545-55; Ex. NA, R. 12,155-62].

With respect to certain of the respondent's witnesses there are striking relationships between the time when they became witnesses and other events. The witness Saunders, because of his former Party membership, was "screened" in 1948 by the Coast Guard and prevented from following his regular occupation as a seaman. In 1951 he went to the F.B.I. and "volunteered" to become a witness in this case; about the same time he was cleared by the Coast Guard and permitted to return to his work after a hearing at which neither he nor anyone else testified on his behalf [R. 807-9, R. 819-32, R. 852-5]. The witness Honig testified that when he was first contacted by the F.B.I. he refused to talk about his activities. His testimony as to just when he was first contacted and when he decided to "cooperate" has been different in the various cases in which he has testified [R. 8119-46]. However, it is clear that shortly before his change of heart, he was arrested on a shoplifting charge, which he asserted was all a mistake, but the charge was dropped and his fingerprint records were destroyed [R. 8146-67; R. 8198-8200].

The informers hired by the F.B.I. did not become students of Marxism-Leninism; they had little or no interest in that subject or in the study of fascism; they learned as little as they possibly could and still remain members of the Party, and thus continue to hold down their jobs with the F.B.I. [see pp. 41, 52, *supra*] [R. 1519; R. 1640; R. 1910-26; R. 3143-4; R. 4082; R.

4140-1; R. 5251-4; R. 6997-9; R. 7555-9]. As one such witness put it, "I never knew and I still don't know a darn thing about Marxism-Leninism and I pray God I never do" [R. 4188-9] and he was only interested in the safety of the United States so he "never listened very much unless some one particular person made a statement that might have endangered the safety of the United States of America" [R. 4163-6, 4242].[64] They joined the Party with preconceived ideas of its purpose for which they sought confirmation [R. 1729-35].[65] Yet virtual illiteracy in the field of the ideas they were reporting on and concerning which they testified was commonplace [R. 1013-18; R. 1020-1; R. 1116-17; R. 1914-23; R. 2907-8; R. 3143; R. 4140-41; R. 4328-9]. They pretended to favor the principles of Communism so that they could gain the confidence and friendship of the people on whom they planned to inform [R. 1841-6; R. 7037-8]. Upon the basis of pretended friendship informers secured entree to social functions and to private homes and reported to the F.B.I. the names of every person present including the names of all the members of the families to whose homes they were invited, as well as "every scrap" of conversation overheard [R. 3108-9; R. 3116-18]. The witness Scarletto testified that it "could be" that a woman, whose name he reported, "treated him like a son"; that he "certainly" considered it "funny" that he had succeeded in soliciting a neighbor, whom he knew to be a non-Communist, for five dollars for the People's World and had then turned in his name to the F.B.I. [R. 3136-

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[64]However, this witness possessed the ability to identify a person as a Communist "by looking at him" [R. 4324].

[65]Note similarity to the witness Hynes in *Schneiderman v. United States*, 320 U. S. 118, 128-9.

40]; he had heard some "crying" about the question of violence against Communists but any interest he would have displayed "would have been part of my act" [R. 3166-7; R. 3172; R. 3178-9].

The paid informers as part of their job carried on activities designed to involve new people in the very conduct they were reporting to the F.B.I. They sold the People's World [R. 1627-32]; they made untrue public statements and falsely relied on constitutional grounds in refusing to answer questions [R. 1708-9].

The unreliability of the testimony of these witnesses was repeatedly *demonstrated.*[66] Thus, for example, persons were placed at meetings at which they or the witness could not possibly have been present [see pp. 63, n. 42; 70, n. 48, *supra;* R. 2510-11; R. 7974-83]. Completely erroneous identifications were positively made [see R. 3289; R. 3949-50; R. 5934-9; R. 5945-53; R. 7590-1]. The witness Scarletto testified that the war in Korea and its causes were discussed in November, 1949, about six months before the war began, in a school which ceased operating prior to the outbreak of hostilities [R. 3000-3; R. 3020-3]. Prior false statements under oath were admitted [R. 3249-50; R. 8630-35]. The witness Scarletto explained his false testimony that he was married in 1948 by relating that he could not get married in a church because of a prior marriage and that therefore he simply lived with the woman he called his wife, whom he took across state lines as such about the time he became an F.B.I. informant [R. 2877-8; R. 2894; R. 3081-91].

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[66]This does not refer to testimony inherently incredible like that of Daisy Van Dorn [pp. 32-37, *supra*], but to testimony conclusively demonstrated to be untrue.

Allegation of overt acts in the indictment and the proof thereof.

The first twelve overt acts alleged in the indictment are dated more than three years prior to the date thereof. Those numbered 13 through 23 were alleged to have been committed within the three year statute of limitations period. With respect to these, evidence was offered relating to only two. One charged: "On or about January 21, 1949, Henry Steinberg, a defendant herein, did attend and participate in a meeting." This refers to the "Lenin Memorial Meeting" chaired by petitioner Steinberg and referred to in the opinion of the court below. [see p. 50, *supra;* Ex. 737, R. 8067-75, GA 207-11, App. Item 77, pp. 294-7; Clk. R. 105, 122-3].

The second overt act charged with respect to which proof was offered read: "On or about January 20, 1950, William Schneiderman, a defendant herein, did attend and participate in a meeting at Embassy Auditorium, Los Angeles, California." This refers to a public meeting previously announced in the People's World held at the Embassy Auditorium in Los Angeles in January, 1950 with about 1600 persons present. This too was a "Lenin Memorial Meeting." Co-petitioner Schneiderman spoke on "the subject matter of the event being a Lenin memorial" [R. 8063]. A subsequent issue of the People's World [Ex. 159-A, R. 5032] stated that nearly 2000 persons had attended the meeting, that co-petitioner Schneiderman spoke on the "China situation"; that China was seen as the "key issue for 1950"; that the people demand to know the stand of Senator Downey and Congresswoman Douglas "on the vital issue of whether they support trade and recognition for the new China, or armed intervention" [R. 8057-66, App. Item 77, pp. 297-301].

The Philbrick articles—The F.B.I. report—Unfair trial.

Both at the outset and in the concluding phases of the trial, petitioners were confronted with a barrage of publicity, calculated to prevent a fair trial. The respondent was not accountable for the former; it was directly responsible for the latter.

A motion for a sixty-day continuance of the commencement of the trial was predicated upon the following facts:

On January 13, 1952, with the opening of the trial scheduled for February 1, 1952, the Los Angeles Times, a newspaper of general circulation published in the City of Los Angeles, announced the impending publication of a serialized story entitled "I Led Three Lives" by one Herbert Philbrick. The announcement was in banner headlines, and described Philbrick as one "whose electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious 'Communist 11.'" Readers were informed that "he reveals how the Communists intend to overthrow the U. S. Government and when." On succeeding days, the announcements continued with such headlines as "When Will Reds Strike U. S."; "Inside Story of Reds' Plot to Begin Sunday"; "Ruthless Underground Red Tactics Exposed." On January 20, 1952, the series commenced with the following foreword: "The Times begins publication today of 'I Led Three Lives,' the dramatic story of Herbert A. Philbrick, 36, a Boston advertising man, who, after nine years underground for the FBI, was a key witness in the trial of 11 top Communist leaders in New York in 1949. They were convicted of conspiracy to teach and advocate the overthrow of the United

States Government and their conviction has been affirmed by the Supreme Court." In subsequent issues, other lurid headlines capped each installment of the Philbrick story, dealing with the "exposure of the Communist plot." The final installment was published on February 7, 1952 [R. 897-8]. On January 21, 1952, petitioners moved the District Court to continue the trial of the action until 60 days after the conclusion of the publication of the aforesaid story. The motion was denied by the District Court without opinion and the trial proceeded as scheduled.

On the afternoon of July 29, 1952, just as counsel for petitioners concluded their final arguments to the jury and on the eve of the closing arguments of respondent, there appeared in the press and on radio and television announcements that "a long secret FBI report" had just been released proving that the Communist Party of the United States advocates and teaches the overthrow and destruction of the Government of the United States by force and violence. Before the day's proceedings had ended and before the jury had left the courtroom. there were already being sold at every exit of the Federal Court Building in which the trial was held issues of the Herald-Express, an evening newspaper distributed in Los Angeles (circulation 305,056), with banner front page headlines in blaring red, reading, "FBI Bares Stalin U. S. Revolt Plot." The article itself was headed, "Armed Revolt Plot Told" [Ex. NG, R. 13,647].

Throughout the evening, announcements of similar import emanated from all radio and television stations in the Los Angeles area. Commentators on radio and television emphasized that the "long secret FBI report" revealed that Russian Premier Stalin had decided that

Communists can climb to power in the United States only by "forcible destruction" of the Government—never by peaceful means; that the purpose of the F.B.I. report, heretofore considered "highly confidential," was to set forth "documentary proof that the Communist Party, U.S.A., teaches and advocates the overthrow and destruction of the United States Government by force and violence" [Ex. NG, R. 13,647].

On the morning of July 30, 1952, the banner front page headline of the Los Angeles Times (circulation 396,112) read: "Stalin Plan To Conquer U. S. Told In FBI Report." A similar headline in the Los Angeles Examiner (circulation 323,936) read: "FBI Bares Stalin's Stand for 'Destruction' of U. S." The Mirror (circulation 202,325) carried the headline: "FBI Reports Reds Seek To 'Kill' U. S." [Ex. NG, R. 13,647].

The Report which these headlines publicized is 16 pages in length [Ex. NF, R. 13,647, App. Item 78, pp. 301-06]. It is entitled "Documentary Proof That The Communist Party, U.S.A., Teaches And Advocates The Overthrow And Destruction Of The United States Government By Force And Violence. (Govt. Printing Office, 1952)." From the preface of the report (p. v.) it appears that on June 21, 1952 and June 25, 1952, while petitioner Yates was testifying that according to her understanding Marxism-Leninism did not mean advocacy of the violent overthrow of our Government, Senator McCarran and J. Edgar Hoover exchanged letters, the purport of which was to arrange to make public a "compendium" prepared by the F.B.I. of documentary proof that the Communist Party "is dedicated to the overthrow of the Government of the United States by force and violence."

The introduction to the Report asserts that its purpose is to set forth "documentary proof that the Communist Party, U.S.A., teaches and advocates the overthrow and destruction of the United States Government by force and violence" (p. 1). The report then states that the Communist Party accomplishes this objective "through the circulation of Communist 'classics' and through urging the study of these works as 'guides to action'" (p. 1); that the works of Marx, Engels, Lenin and Stalin "do indeed teach and advocate the overthrow and destruction of government by force and violence"; that "Lenin and Stalin both specifically reject 'peaceful means'; that both insist on the necessity for violent revolution" (p. 1). Then follow quotations from the following writings, which, prior to the date of the correspondence, had been introduced in evidence in this case: Stalin's "Foundations of Leninism" [p. 2; Ex. 1, R. 1357; Ex. 606, R. 499]; "History of the C.P.S.U." [p. 7; Ex. 28, R. 1362; Ex. 608, R. 483]; "Communist Manifesto" [p. 9; Ex. 39, R. 1352]; "Proletarian Revolution and Renegade Kautsky" [p. 8; Ex. 504, R. 4403]; "State and Revolution" [p. 8; Ex. 11, R. 1360]; Foster's "In Defense Of The Indicted Leaders Of The Communist Party" [p. 3; Ex. FI, R. 5105]; "Capital," Vol. 1 [p. 8; Ex. Q, R. 1679]; "Anti-Duhring" [p. 9; Ex. HD, R. 6793].

The report was interspersed (pp. 2, 3, 7, 16) with conclusions that the Communist Party and Marxist-Leninist books advocate and teach the forcible overthrow of the Government and that reforms espoused are only covers for "illegal work." It stated (p. 2): "The customary Communist 'dodge' on the question of force and violence is

that the capitalist class will be the *first* to use violence, and the Communists will respond with violence. . . ."[67]

On the morning of July 30, 1952, petitioners orally moved for a mistrial [R. 13,519]. Leave was granted to file formal papers the next day [R. 13,528]. A request to suspend proceedings until the court had had an opportunity to rule upon the pending motion for a mistrial was denied [R. 13,528-35]. Respondent proceeded with its summation to the jury. On July 31, 1952, there was submitted an affidavit detailing the contents of the newspaper, radio and television publications, and of the F.B.I. report and alleging the irreparable prejudice and harm caused by the publication of said F.B.I. report [Ex. NG, R. 13,647; Ex. NF, R. 13,645-47].

After argument, the Court indicated that it would not grant the motion for mistrial without consulting the jury [R. 13,691]. The petitioners, without waiving their position that irremediable prejudice had already been shown, consented to an inquiry being made. The court ruled, however, that there would be no inquiry "in detail"; that there would be only one question, whether "that has happened to them [whether they had read or heard any of the publications], and if so, has it affected them in such a way, any of them, that they feel they could not

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[67]This not only labelled a "dodge" the position shown in this case to have been taken by co-petitioner Schneiderman and other petitioners, but it implicitly charged that the Supreme Court had been taken in by this "dodge." *Cf. United States v. Schneiderman*, 320 U. S. 118, 157.

with an open mind decide this case solely upon the evidence adduced here as they are duty-bound and oath-bound to do, and that is all. That we take their word for it, whatever it is . . . I expect to put it as a compound inquiry. It is a matter for the juror's conscience now." Petitioners requested that there be two separate questions: the first, whether the publications had been communicated to any juror and, if so, the second, what effect it had; petitioners' position, which they refused to waive, was that if the publication reached the jury that alone was sufficient to require that the motion for mistrial be granted. The trial judge thereupon denied the motion, without making any inquiry of the jury [R. 13,703-19, 13,722-3]. The petitioners then offered an instruction [Pet. Prop. Special Inst., Ex. NH, R. 13,723-25, App. Item 2(q), p. 69] specifically advising the jury to disregard the comments which had emanated from the press, radio and television. The instruction was refused. In a written opinion, the District Court reiterated its position, adding only that "It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial." *United States v. Schneiderman, et al.*, 106 F. Supp. 906, 926 (Cert. App. B, p. 143). A motion for leave to interview the jury after verdict (the court having previously ordered the parties, their counsel and agents not to talk to any member of the jury) solely to determine whether they had read or were informed of the F.B.I. report was denied [R. 14,008-10].

Instructions and refusals to instruct.

The trial court gave certain instructions over the objections of petitioners and refused others proposed by them [Exs. NC, NC-1, NC-2, NC-3, ND, R. 13,777-834, App. Item 2, pp. 3-81].[68] The court, although requested to do so both by petitioners and respondent, refused to instruct the jury that the law punishes only advocacy and teaching of (or a conspiracy to advocate and teach) the forcible overthrow of the Government by language reasonably and ordinarily calculated to incite persons to action with the intent that such teaching and advocacy be of a rule or principle of action [Pet. Prop. Insts. 25, 29 and 51, Ex. NC-1, App. Item 2(q), pp. 69, 73-4, 76; Supp. App. Item[69] 28, pp. 36-6].

Over petitioners' objections, the jury was instructed that the word "organize" in 18 U. S. C. 2385 includes "the

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[68]The complete numbered instructions given [Ex. 750 for identification] are set forth in App. Item 2(a) to 2(p), pp. 3-69. Petitioners' objections are set forth in full directly following each instruction together with instructions requested in connection therewith. At the conclusion of the Court's instructions there are set forth other requests for instructions which the Court refused (App. Item 2(q), pp. 69-81).

[69]Supp. App. Item refers to Petitioners' Supplemental Appendix in the Court of Appeals, which Supplemental Appendix was attached as part of Petitioners' reply brief in said Court. Item 28 is respondent's proposed instruction: "In further construction and interpretation of the statute I charge you that it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action. Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group

recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization" [Inst. 13, R. 13,756, 13,793, Ex. NC-1, App. Item 2(g), pp. 36-8]. The Court declined to instruct the jury as requested by petitioners: "To 'organize' means to furnish with organs, to give an organic structure to. To organize means to bring into existence and is a very different thing from extending the limits of an organization or adding to or increasing its size" [Pet. Prop. Inst. 34, App. Item 2(g), pp. 37-8].

The District Court refused to instruct the jury that mere proof of participation "in the Communist Party's lawful activities" was not proof of an "overt act"; that if the proof showed no more than the exercise by petitioners "of lawful discussion by speech and press," and "peaceable assembly and association to seek redress of grievances," then the "overt acts" had not been established [Pet. Prop. Insts. 39, 40, 42, 43, 44; App. Item 2(e), pp. 26-9]. The District Court simply instructed the jury

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and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."

that an "overt act" under the indictment herein "need not be criminal in nature," and may be "as innocent as the act of a man walking across the street," so long as the "act" tends to accomplish the plan or agreement and is knowingly done in furtherance of "an object or purpose of the conspiracy charged in the indictment" [Inst. 11-H, R. 13,747, App. Item 2(e), pp. 24-5]. The trial court denied petitioners' request that the jury be instructed that the testimony of witnesses who entered the Communist Party at the request of the F.B.I. should be scrutinized closely and acted upon with caution [Pet. Prop. Inst. 77, Ex. NC-1, App. Item 2(q), p. 80].

Verdicts of guilty as to all petitioners were returned on August 5, 1952 [Clk. R. 96] and judgments imposing upon each petitioner the maximum sentence permitted by law, five years imprisonment and $10,000 fine, were entered on August 7, 1952 [Clk R. 102-3]. Notices of appeal were filed the same day. Motions for judgments of acquittal, for a new trial and in arrest of judgment were all made, argued and denied [R. 9384-93; R. 10,076-7, R. 12,569-76, R. 13,915-14,072, Clk. R. 103]; *United States v. Schneiderman,* 106 F. Supp. 906 (Cert. App. B, pp. 128-45). In its rulings the Court adopted respondent's theory that a series of inferences rendered the evidence sufficient to sustain the verdicts. These are: first, "that the Communist Party is an organization which advocates the duty and necessity of the overthrow of the government of the United States by force and violence

in order to achieve [its] ultimate goal [socialism];[70] second, "that the party intends to accomplish that result as speedily as circumstances permit;" third, "that a majority of the members of the party or, probably more accurately, at least, the dominant members of the party, embrace and support that objective and that method of achieving the objective;" fourth, "that these defendants are members of the Communist Party of varying degrees of standing and activity" and that, therefore, "the defendants embrace the doctrine and subscribe to the view that advocates the duty and necessity of overthrowing the government of the United States by force and violence as speedily as circumstances permit;" and fifth and finally, "from their membership in the Communist Party and the activities shown, the jury might infer . . . such concert of action as is described as a conspiracy" [R. 9987-8, App. Item 4, pp. 82-3].

The Court of Appeals affirmed in an opinion which declared "the trial impeccable from the standpoint of fairness and from the standpoint of adherence to principles theretofore laid down" [Clk. R. 105, 132].

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[70]This inference is itself predicated upon the inference that Marxism-Leninism requires the advocacy of the proscribed doctrine. In fact it is this inference which is the cornerstone for all the other inferences from which the finding of guilt was drawn. Thus respondent in arguing against petitioners' motion for judgment of acquittal said: "But here we believe that we have shown that these people have embraced and advocated the Marxist-Leninist doctrine, its teachings; . . . We are charging these people with being conspirators to advocate these doctrines" [R. 9975-6].

Summary of Argument.

The courts below sustained the convictions of petitioners in plain disregard of the standards fixed in *Dennis* and in violation of the mandate of the First Amendment. As thus construed and applied, the bounds of governmental power have been exceeded and petitioners deprived of their liberties by an unconstitutional enactment.

1. The convictions here can be sustained only upon a ruling that proof of long-time membership and officership in the Communist Party and legal activities therein is sufficient without more to justify a finding of guilt under an indictment charging a conspiracy to advocate and teach the forcible overthrow of the Government and to organize the Party for such purpose. As to six of the petitioners here, that was all the evidence established in this case. As to the five other petitioners, there was nothing in the few utterances attributed to them, as analysis shows, which could in any way sustain a finding of their connection with the conspiracy alleged in the indictment or the proscribed specified intent. The respondent must rely upon petitioners' membership, officership and activity in the Communist Party having no relation to the advocacy or teaching of force and violence as proof of each of the petitioner's guilt.

The theory of respondent, adopted by the courts below, is predicated upon three proven facts: first, that the Communist Party subscribes to the principles of Marxism-Leninism; second, that the large body of writings which comprise the doctrines of Marxism-Leninism include in historical context mention of violent revolution, with respect to which no such writing states that the present Government of the United States should be forcibly over-

thrown and all repeatedly indicate that the language in the writings is not to be taken literally and that the principles of Marxism-Leninism will vary in application dependent upon time, place and circumstances; and third, that petitioners were long-time Party members and officers, actively engaged in legal activities of the Party. From these premises, respondent and the courts below drew successive inferences, each inference pyramided on the preceding inference, viz.: Marxism-Leninism can only be construed as calling for the violent overthrow of the Government of the United States; from this inference it must be inferred that the Communist Party by its advocacy of Marxism-Leninism advocates the forcible overthrow of the Government; from this inferred Party advocacy it must be inferred that long-time members and officers of the Party, including each of the petitioners, knew that Marxist-Leninist doctrines as construed by the Party called for the violent overthrow of the Government of the United States; from such inferred knowledge it must be inferred that each of the petitioners agreed with the principles of Marxism-Leninism and the objectives of the Party as thus construed; from this inferred agreement it must be inferred that each of the petitioners agreed with the others to advocate and teach the forcible overthrow of the Government and to organize the Party for such purpose; from such inferred agreement, it must be inferred that the advocacy and teaching contemplated by the agreement was to be in language of incitement to action; and, from such inferred agreement, it must be inferred that each of the petitioners intended to accomplish the forcible overthrow of the Government as speedily as circumstances permit.

This theory explains respondent's reliance on a record barren of any substantial and competent direct or circumstantial evidence establishing the conspiracy alleged in the indictment, each of the petitioner's connection with such conspiracy, the proscribed specific intent or the power of petitioners to bring about an attempted forcible overthrow of the Government. It further explains why the respondent filled the record at inordinate length with hundreds upon hundreds of quotations wrenched out of context from numerous Marxist writings, and with extended proof of petitioners' membership and officership in the Party and legal activities therein.

A conviction under the Smith Act upon such theory is contrary to law and the Constitution. In cases involving the exercise of freedom of speech, every essential ingredient of the offense must be established by clear, unequivocal and convincing evidence. Conclusions of guilt in such cases cannot be drawn from a sequence of dubious, illogical and arbitrary inferences piled one atop the other. The interpretation and understanding of a large body of philosophical, scientific and historical writings may be as varied as the varied readers. Such interpretation and understanding cannot be imputed; to determine any particular knowledge or understanding there must be substantial proof of overt acts and declarations on the part of the particular reader clearly evidencing his particular understanding and interpretation. Such evidence was lacking here.

In presenting such a theory of inferred criminality from membership in the Communist Party and legal activities therein, respondent is resurrecting the doctrine of guilt by association, which this Court has uniformly condemned. Congress, too, in the enactment of Section 4(f) of the McCarran Act has rejected the doctrine as applied to members and officers of the Party. The adoption of respondent's theory as a substitute for sufficient proof of guilt under the indictment impairs petitioners' opportunities of free speech, press and assembly and deprives them of their liberties without due process of law.

Respondent's theory in *Dennis*, and the evidence therein, are essentially different from this case. In *Dennis*, the theory of the prosecution was predicated upon evidence of control by the accused of the Party apparatus and upon a finding of use of their leading positions to accomplish jointly the alleged agreement to advocate the forcible overthrow of the Government. Here the petitioners were not a homogeneous group exercising common powers, and they never jointly organized or determined any Party policies. Most of the petitioners occupied relatively minor and separate offices. There was no proof in this case of joint control or action allegedly aimed at the unlawful objectives of the alleged conspiracy. There was no common plan or agreement proven; "conspiracy" and the power to bring about the "evil" were inferred from mere membership and officership in the Communist Party and legal activities therein.

2. The only two "overt acts" alleged and proved were two innocuous public meetings held under the auspices of the Communist Party from which no inference that the alleged conspiracy was in execution could be drawn. The First Amendment forbids convictions based upon proof only of the exercise of wholly innocent acts of speech, press and assembly. What in effect was done by the courts below was to ignore the requirement of substantial proof of an "overt act" in furtherance of the conspiracy and to effect the object thereof, and to return to the doctrines of common law conspiracy. To assign the function of zero to the "overt act" under the general conspiracy law is to increase the threat to fairness in the administration of justice; to undermine freedom of assembly by making a petitioner's attendance or lawful utterance at a peaceable assembly an "overt act" in furtherance of the alleged conspiracy; and to undermine the landmark decisions of this Court in *DeJonge v. Oregon, Herndon v. Lowry* and *Schneiderman v. United States.*

3. Both the petitioners and respondent requested the trial court to instruct the jury that the Smith Act punishes only advocacy and teaching in language of incitement to action. All such requests were refused, the courts below holding that the Smith Act punishes any conspiracy to advocate and teach the forcible overthrow of the Government with unlawful intent, whether the contemplated advocacy and teaching is in language of incitement or not. Since there was no evidence of the use

of inciting language by petitioners, nor any plan by petitioners to do so in the future, the jury was left free to bring in a verdict of guilt under the indictment merely upon the alleged proof that petitioners, as members and officers of the Party, contemplated teaching and advocating, without incitement to action, the doctrines of Marxism-Leninism. In *Dennis*, from trial court level to the final ruling of this Court, not a single Judge or Justice differed with the view that the Smith Act must be necessarily construed as punishing only advocacy and teaching in language of incitement to action. This Court has uniformly held, in the light of law and history, that in our constitutional system the line must be drawn between the advocacy of ideas and doctrines, no matter how unpalatable, and the advocacy of ideas in language of direct incitement to unlawful action. The construction of the Smith Act by the courts below was a palpable violation of the First Amendment.

4. The trial court held that a conspiracy to advocate and teach the forcible overthrow of the Government with unlawful intent constituted *per se* a clear and present danger of an attempted forcible overthrow of the Government. The Court of Appeals upheld this ruling, adding only that world conditions had not changed since the ruling of this Court in *Dennis*. As a result, no consideration was given below by the court or the jury to the question of whether or not the alleged conspiracy contemplated advocacy or teaching in language of incitement to action; whether or not the petitioners, individually or

jointly, had the power to bring about an attempted forcible overthrow of the Government; or whether or not the nature of petitioners' activities was directed to such end. In refusing to give consideration to any question other than the questions of conspiracy and intent as alleged in the indictment on the issue of clear and present danger, the trial court abdicated the judicial function which the law and the Constitution required the court to perform, and which the court alone could perform, as this Court held in *Dennis*. Thus the courts below unjustifiedly applied the Smith Act to the petitioners here.

5. The courts below held that the word "organize" in the Smith Act includes the recruitment of new members, the forming of new units or the regrouping or expansion of existing clubs, classes and other units of "any society, party, group or other organization." This improvised and limitless construction of the statute finds no support in dictionary definitions, legal precedents or legislative history. On the contrary, all authority is opposed to this construction. The extended interpretation of the word "organize" by the courts below raises constitutional questions of serious import. Not only the recruitment of a single member into the Communist Party but even the act of joining may constitute "organizing" or "helping to organize" the Party under the Smith Act, according to the construction of the courts below. The prosecution here for conspiracy to organize as alleged in the indictment was barred by the statute of limitations. It is impossible to determine now from the general verdict

of the jury whether or not the jury's determination was based solely upon this charge, especially since the prosecution here, as in *Dennis,* relied principally upon the organizing aspect of the indictment.

6. Not only was the First Amendment violated in all the aforesaid essential respects, but petitioners were also deprived of a fair trial without due process of law. The publication of the F.B.I. report by the Department of Justice, dealing with some of the essential issues of fact in the case as viewed by the prosecution itself, on the very eve of the submission of the case to the jury, was a direct interference with the administration of justice. The refusal of the trial court appropriately to explore the matter with the jury after the coercive and hysterical publicity which accompanied the publication of the Report had been amply established, and the refusal to give any specific instructions requested by petitioners, were serious errors. The trial court also erred at the outset of the trial in refusing a motion for a continuance until sixty days after the completion of the publication of a story in serial form entitled "I Led Three Lives," which story was publicly stated to have been written by a prosecution witness in the *Dennis* trial and purported to detail "how the Communists intend to overthrow the U. S. Government and when." Failure to grant petitioners an impartial trial under the Constitution vitiated the verdict.

ARGUMENT.

I.

The Evidence Is Insufficient to Support the Verdicts.

The Scope of Review.

This Court has said that in a criminal case it will examine the record to ascertain whether it contains evidence adequate to permit a finding of guilt beyond a reasonable doubt (*Mortensen v. United States*, 322 U. S. 369, 374). By the ordinary standards of criminal law, the evidence in this case is insufficient to sustain the conviction of any petitioner; and it does not even approximate the character and quality of proof rendered imperative by the higher standards, applicable in a Smith Act prosecution, requiring "special heed to the demands of the First Amendment marking out the boundaries of speech." (*Dennis v. United States*, 341 U. S. 494, 503.) The courts stand guard against any punitive invasion of the area delineated by these boundaries. This task is one which this Court has announced it will not shirk because indeed it "cannot . . . . withhold the judgment that history authenticates as the function of this Court when liberty in infringed" (*West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, 640; *Cf. Chambers v. Florida*, 309 U. S. 227, 241). In *Dennis* the Court gave assurance that it would fulfill this high responsibility in future Smith Act cases. "Where there is doubt as to the intent of defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (341 U. S. at 516; specifically held applicable to these petitioners, *Stack v. Boyle*, 342 U. S. 1, 5).

The assertion that a "doubt" concerning the sufficiency of the record will be enough to invoke the scrutiny of this

Court was not a mere exuberance; it must be regarded as a statement that this Court intends to secure the people of this nation against governmental transgression, upon unconvincing proof, into the area shielded by the First Amendment. This duty requires the Court to examine the record in this case with a vigilance that will expose and strike down any device calculated to secure a conviction at the expense of constitutionally guaranteed freedoms. It necessitates an examination of the evidence, particularly with respect to the nature of each petitioner's activities, to determine whether it is sufficient to permit a finding beyond a reasonable doubt of (1) a conspiracy to advocate the violent overthrow of the Government of the United States; (2) each petitioner's connection therewith as shown by his activities; (3) each petitioner's specific intent to accomplish such violent overthrow as speedily as circumstances will permit; and (4) the power of petitioners to bring about an attempt at such violent overthrow (*Dennis v. United States,* 341 U. S. 494).

The record must be analyzed to ascertain whether there is direct evidence adequate to support beyond a reasonable doubt each of these essential findings, and, where that is lacking, whether these findings may be thus supported by inferences properly emanating from the direct evidence. A "sinister meaning attributed" by the prosecution to language used by defendants will not suffice. The record must show acts, statements or declarations by the defendants indicating that they understood the language as having or that they intended it to have the sinister meaning which rendered the speech culpable. (*Fiske v. Kansas,* 274 U. S. 380, 385-7.) No constitutionally permissible inference of guilt may be drawn from acts or utterances which may fairly be inferred to be the

exercise of protected freedoms (*Hartzel v. United States,* 322 U. S. 680; *Schneiderman v. United States,* 320 U. S. 118; *DeJonge v. Oregon,* 299 U. S. 353; *Herndon v. Lowry,* 301 U. S. 242). Moreover the direct evidence and the inferences drawn therefrom must certify "that solidity of proof which leaves no troubling doubt." Whether from the entire record this "exacting standard of proof has been satisfied" presents a question for this Court. In resolving this issue it is necessary to scrutinize "the nature of the materials" on which the findings are based in order that "fallible evidence," such as that of speech more "rhetorical" than "conclusive," not be substituted for what has been referred to variously as "weighty proof," a "compelling" record and "clear, unequivocal and convincing" evidence (*Baumgartner v. United States,* 322 U. S. 665, 670-77).[71] When the record in this case is put to the test that the Constitution demands, it is found wanting on every issue.

The following discussion is intended to demonstrate the aforesaid infirmities in the record. We analyze, first, the evidence against the petitioners to show how completely barren the record is to establish the connection of each of the accused with the conspiracy charged in the indictment. We then discuss the invalidity of respondent's abstract theory of guilt whereby a series of unfounded and pyramided "inferences" are substituted for "clear, convincing and unequivocal" proof. We show how this "inference" theory is contrary to law and logic, to express

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[71]The burden of proof in a denaturalization case like *Baumgartner* "is substantially identical with that required in criminal cases" (*Klapprott v. United States,* 335 U. S. 601, 612). This identity is the more complete because of the similarity of the First Amendment problems presented in the cited and instant cases (*Cf. Pennekamp v. Florida,* 328 U. S. 331, 347-8).

Congressional intent, and impermissible in our constitutional system. The discussion then demonstrates that the evidence neither established the conspiracy charged in the indictment nor the requisite specific intent of any of the petitioners. Finally, it is shown that there was no evidence to establish that these petitioners, individually or jointly, had the power to bring about the substantive evil which the legislature had a right to prevent.

A. The Evidence Does Not Establish the Connection of Any Petitioner With the Conspiracy Charged.

There is a complete absence of evidence upon which any petitioner's connection with a conspiracy as charged can be sustained. A conspiracy is an agreement; it requires a meeting of the minds of the conspirators. A defendant's connection with a conspiracy cannot be shown without proof of his adherence to that agreement. Such adherence may be proved only through the declarations and conduct of the individual defendant [*Sugarman v. United States*, 35 F. 2d 663 (C. A. 9, 1929); *May v. United States*, 175 F. 2d 994, 1008 (C.A. D.C., 1949); *Mayola v. United States*, 71 F. 2d 65, 67 (C. A. 9, 1934); *Kuhn v. United States*, 26 F. 2d 463, 464 (C. A. 9, 1928); *United States v. Food and Grocery Bureau of So. Calif.*, 43 F. Supp. 966, 973 (D.C. S.D. Cal., 1942); *Cf. United States v. White*, 322 U. S. 694, 702-3]. On this issue each petitioner "stands before the bar of justice as an individual. Even in a conspiracy charge defendants do not lose their separateness or identity" (Mr. Justice Jackson concurring in *Stack v. Boyle*, 342 U. S. 1, 9).

Membership in the Communist Party does not constitute membership in the conspiracy charged. The indictment on its face and as construed by the parties and the

trial court charged an agreement to engage in the forbidden advocacy and to organize the Communist Party as the organizational apparatus for such advocacy. Accordingly a finding of participation in the conspiracy requires for each petitioner an adequate showing through his acts and conduct that he was party to a meeting of the minds on the advocacy of the overthrow of the Government of the United States by force and violence [R. 3379, 3405, 3473, 8734; Inst. 11-J, R. 13,749, App. Item 2(f), p. 30; Inst. 13, R. 13,756, App. Item 2(g), p. 36; Inst. 11-D, R. 13,745-6, App. Item 2(d), p. 22; Inst. 11-I, R. 13,747-8, App. Item 2(f), pp. 29-30; Inst. 14-B, R. 13,759, App. Item 2(h), pp. 40-41].

The only evidence against most of the petitioners is that they have been members and officers of the Communist Party and that they have engaged in constitutionally protected activities therein, none of which even by the most tenuous argument could be said to show adherence to an agreement to engage in the proscribed advocacy. With respect to several of the petitioners, there is evidence of a few isolated and equivocal incidents, which when measured by the standards prevailing in a case such as this, add nothing of substance to the evidence of Party membership and the exercise of constitutionally guaranteed rights within or under the auspices of the Party. We turn to a discussion of these incidents.

1. The crucial period, during which connection with the conspiracy charged must be established, is the three year period preceding the return of the indictment—the area of time within the statute of limitations. During that period there is *only one* incident involving *only one* petitioner which even merits consideration in determin-

ing whether any conduct pointing to participation in an illegal agreement is to be found in the record.

This one incident occurred in the community of Chico in 1950 when a paid F.B.I. informer was in the process of being expelled from the Party for "chauvinism" and for carrying a gun while distributing Party leaflets. Expulsion on these charges, petitioner Lambert is reported to have said, was a step in the preparation of the Party for "emergency or revolution." The informer, according to his own testimony, then asked whether it was true that a revolution "by bullets instead of ballots" was being prepared, and a *third person* asked "What the Hell do you think we are purging the Party for?" (See p. 76, *supra*).

In weighing what this testimony adds to the respondent's showing of petitioner Lambert's alleged connection with the conspiracy charged, it is necessary to consider certain general principles applicable to much of respondent's evidence.

(a) Testimony from the unaided and uncorroborated recollection of a paid informer is an inherently weak species of evidence. It should be examined "with greater scrutiny and care than the testimony of an ordinary witness." *Fletcher v. United States*, 158 F. 2d 321 (C.A. D.C., 1946); *Cf: District of Columbia v. Clawans*, 300 U. S. 617, 630. The use of paid informers in cases involving thoughts, opinions or political activities is inconsistent with a free society. "The informer smacks of the police state." N. Y. Times, July 8, 1954. There is a danger to the administration of justice when witnesses, who make their living at this game, feel the necessity of continuing to "produce" if they are not to give up their

lucrative occupation. A premium is placed on perjury. When persons are employed to spy on associations deemed "subversive," there is the tendency to lie and distort as a matter of "patriotism." Evidence is manufactured because it is deemed good for society. Chafee, *Free Speech In the United States* (1941), pp. 277-80.[71a] These principles are the more applicable here because the alleged conversation took place during an incident which led to the loss of the witness' highly remunerative employment as an informer.

(b) Not only the source but the character of the testimony renders it unreliable. It consists of what a hostile witness testifies he recollects that he heard. Words are subject to many constructions depending upon the context in which they are used, the manner in which they are uttered (whether seriously, in jest, sarcastically or polemically), and the attitude of the listener to the speaker (whether friendly or hostile, respectful or suspicious). The self-interest of the hearer colors what he hears. A gap in the knowledge of the subject matter between the one who expresses an idea and the one who listens can result in an understanding of what is heard quite different from what is intended by the speaker.

[71a] The trial judge refused to instruct the jury as requested by petitioners that the testimony of witnesses who entered the Communist Party at the request of the Federal Bureau of Investigation should be weighed with caution (Prop. Inst. 77, Ex. NC-1, App. Item 2(q), pp. 69, 80). To have denied this specific request in the light of the record was reversible error. *District of Columbia v. Clawans*, 300 U.S. 617, 630; *Fletcher v. United States*, 158 F. 2d 321, 322 (C.A. D.C., 1946); *Fisher v. United States*, 231 F. 2d 99 (C.A. 9, 1956); *Sigurdson v. Landen*, 215 F. 2d 791 (C.A. 9, 1954); *Gratty v. United States*, 163 F. 2d 844 (C.A. D.C., 1947); *Cf. Communist Party v. Subversive Activities Control Board*, ... U.S. ....., 100 L. ed. Adv. p. 554.

The more complex the subject matter of the speech or the concepts to which it has reference (regardless of other differences in view point concerning Marxism-Leninism, its complexity cannot be doubted), the greater the margin of probable misconstruction. To all this must be added the multiplicity of shades of meaning which may reasonably be attributed to almost any word or phrase. Differences in comprehension of carefully formulated writings are not unknown to the law or for that matter to this Court (See Wigmore, *evidence* (3rd ed.), Vol. 7, Section 2094, pp. 467-9).

The passage of time between the speech and its reporting aggravates all of the problems inherent in an honest attempt to accurately report what was said. What the witness relates is not the words that were used but his comprehension of them sifted "through the distorting and self-deluding medium of memory" *Baumgartner v. United States*, 322 U. S. 665, 675 When the ease of deliberate distortion or actual fabrication is added to the other weaknesses in testimony of this character, it becomes apparent why Wigmore has concluded that "no substantial reliance" may be placed on it (*Evidence* (3rd ed.), Vol. 7, Sec. 2094, p. 468).

(c) An informer's testimony concerning oral declarations being intrinsically unreliable on two scores, any uncertainty as to the conclusion to be drawn therefrom renders it virtually valueless. *Cf. Pulver v. Union Inv. Co.*, 270 Fed. 699, 705 (C.A. 8, 1922); *Lubriko v. Wyman*, 290 Fed. 12, 16 (C.A. 3, 1923). Particular care must be taken in drawing inferences involving the intent with which words are used and equivocal language will not suffice. *Shepard v. United States*, 290 U. S. 96, 100;

United States v. Ross, 92 U. S. 281, 283; *Rivera v. United States*, 57 F. 2d 816, 822 (C.A. 1, 1932). Thus it has been said that "strong words are not evidence of malice" (*Dickins v. International Brotherhood, etc.*, 171 F. 2d 21, 25) and neither are they evidence of participation in a conspiracy to advocate the overthrow of the Government by violence. If such declarations are susceptible of an innocent interpretation, they may not become hallmarks of guilt. *Keegan v. United States*, 325 U. S. 478.

Here all that petitioner Lambert is reported to have said is that the Party was being purged for emergency or revolution. There is nothing indicating that he thought of violence in connection with this alleged statement; the circumstances point in the opposite direction. For the "purging" that was taking place involved the elimination from membership of a man who mistreated Negroes and who carried a gun; ruthless people with guns are essential to the initiation of a violent revolution; they are obstacles to those who desire to bring about change by peaceful methods.

Of course, the informer claims that he asked the bullets instead of ballots question. But these were not the words of petitioner and he did not respond to them. The response from another person in the form of the question "What the Hell do you think we are purging the Party for?", cannot be equated to a statement that the Party was being purged for a revolution by bullets. In order to attribute such an understanding to petitioner Lambert, it would be necessary to indulge in the following assumptions: first, the question itself was intended to indicate an assertion that the informer was being expelled for

carrying a gun because a revolution by bullets was being planned. The contrary conclusion that the Party was being purged of those elements who leaned toward violence is, at least, equally plausible; second, starting from this first insecure premise it is necessary to suppose that petitioner understood the question to have the evil connotation; third, it must then be assumed that petitioner agreed with the language so construed; fourth, from this it must be found that he was a member of the conspiracy charged. Such a series of inferences arising from an insecure foundation hardly afford the solidity of proof which is required in a case such as this (See discussion *re* pyramiding of inferences, pp. 145-158, *infra*).

(d) This informer's testimony as to oral declarations, helpful to respondent only by imputation of an evil contruction to ambiguous language followed by a series of doubtful inferences, is unreliable for other reasons. Appellate courts have carefully examined testimony of unsworn statements to ascertain whether the specific evidence is sufficiently trustworthy to support a judgment. In so doing the Courts have given consideration to the following factors: "That the testimony is improbable . . . absurd . . . not in harmony with the conduct of the witness or declarant . . . that the witness is not corroborated by any independent circumstances in the case . . . that the alleged statement was made . . . in the heat of discussion." 31 C.J.S., Evidence, Sec. 268, p. 1019. Such factors merit special attention in a First Amendment case where the evidence must be clear and convincing in order to sustain a conviction. *Herndon v. Lowry*, 301 U. S. 242; *Fiske v. Kansas*, 274 U. S. 380; *Hartzel v. United States*, 322 U. S. 680.

The evidence concerning this alleged incident is out of joint with the testimony as a whole. Given its illegal connotation, it means that *in 1950* the Party was *then planning and preparing for* a revolution by bullets instead of ballots. If this were true, it could be expected that conversations concerning these plans were being carried on in the Party at places other than the little town of Chico and on other occasions than the expulsion of a member because among other things he carried a gun. In fact it would be difficult to imagine a more unlikely place or occasion for a disclosure of this character. If such a momentous task were being then contemplated by a conspiracy of which petitioners were assertedly a part there would be some corroboration, from among the substantial number of spies and informers who were available to testify, of petitioners' participation in the preparation therefor. But the record reveals not a single discussion at any time and not a single act by Lambert or any other petitioner consistent with the unfolding of such plans.

Moreover during the entire three year period preceding the indictment there is no evidence that petitioner Lambert or indeed any other petitioner said or did anything relating in any way to advocacy of violence or of revolution. On the other hand the record is replete with evidence of the pursuit by petitioners of legal objectives through legal channels, tending to negate the view that their objective was unlawful advocacy. *Keegan v. United States*, 325 U. S. 478, 485. The evidence relating to this incident cannot be reconciled with the rest of the record. Its introduction as part of respondent's case emphasizes the anaemic character of the record upon which the convictions rest.

For the entire three year period within the statute of limitations there is no evidence to support the convictions unless it be petitioners' membership and officership in the Party, legal activities therein plus whatever the Chico incident may add insofar as the petitioner Lambert is concerned.

2. In the period between the alleged beginning of the conspiracy in 1940 and the time when the statute of limitations began to run in 1948, there are several incidents of dubious impact based upon unreliable testimony which require examination. In evaluating this evidence it must be remembered that the petitioners' connection with conspiracy must be established for the period within the statute of limitations. Accordingly, any evidence relating to such connection during the period outside of the statute depends, for its ultimate effectiveness, upon an inference of continuity. Such an inference or presumption must rest upon a durable foundation and fit neatly into it; "some isolated circumstance" is not the stuff to support it. *Maggio v. Zeitz*, 333 U. S. 56, 65-6. It "grows weaker as time passes, until it finally ceases to exist." *Marin v. Ellis*, 15 F. 2d 321 (C.A. 8, 1926). (See also *Brune v. Fraidin*, 149 F. 2d 325 (C.A. 4, 1945); *Liverpool & London & Globe Insurance Co. v. Nebraska Storage Warehouses*, 96 F. 2d 30, 36 (C.A. 8, 1938) [three year passage of time destroys presumption].)

Here the link to the pre-statute incidents is tenuous. It consists of the fact that the petitioners involved were members of the Communist Party both at the time of the alleged incidents and during the period within the statute. The incidents, it is claimed, establish that the Party advocated violent revolution and the petitioners involved

knew it. It is then presumed that both the character of the Party and the petitioners' knowledge thereof continued unchanged. This assumption is inconsistent with the uncontradicted evidence that the position of the Party does change from time to time. As Chief Judge Knox said in *United States v. Lustig*, 16 F.R.D. 378 (D.C. N.Y., 1954): "It cannot be said with any degree of certainty that the aims and objectives of the Communist Party over a period of many years were identical. See the majority opinion of the Supreme Court in Schneiderman v. United States, 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796. See also, U. S. v. Hauck, 2 Cir., 155 F. 2d 141 and U. S. v. Sotzek, 2 Cir., 144 F. 2d 576." The evidence does not support any finding of connection with the conspiracy charged as of the time that the incidents allegedly occurred, let alone a presumption of continuance.

(a) *Petitioner Stack.* The first of these incidents involves a speech allegedly made by the petitioner Stack in 1945 when she is reported to have urged the reinstitution of Marxist-Leninist principles and to have declared that American workers would be the "grave diggers of the capitalistic government" [R. 3860-2, GA 130]. Marxist-Leninist principles cannot be mechanically equated with the proscribed advocacy; and the use of a rhetorical phrase relating to the burial of a "system" does not connote advocacy of violence. Any inference of such advocacy involves a choice between alternative inferences, with the nonculpable alternative being at least equally deducible. From an inference thus arbitrarily selected to draw the further inference of continuance and from the latter to draw the inference of connection with a conspiracy defies logic and undermines the protection of

the First Amendment. Particularly is this so because this weakest of all kinds of testimony—that concerning an oral declaration—is here funnelled over a period of six years through the unreliable and untrustworthy recollection of a paid informer—Stephen A. Wereb—who offered fervent prayers that he would never understand the subject of Marxism-Leninism concerning which he testified (see p. 103, *supra*).

According to the testimony of another paid informer (one who relied on his income from this source for his livelihood, see p. 88, *supra*), petitioner Stack in 1946 spoke of the Communist Party as "the instrument through which . . . this capitalist form of government will be overthrown, and a socialist form of government set up" [R. 1339-41, GA 29-30]. Such a statement no more clearly points to advocacy of violence than would urging of the overthrow of a political machine or of our bicameral legislative system. It adds only a further basis for surmise and conjecture which in times of stress is all too often allowed to perform the function of clear and convincing evidence.

Finally, with respect to petitioner Stack, in a speech in 1948 in which she discussed the "exploitation" of women and said that it would be ended only under socialism, she is reported to have used words "to the effect" that "women should take up the necessary arms side by side with men" and bring about the change to socialism (see p. 90, *supra*). The references in the same speech to the "historic" women of Russia; to the "dawn of socialism," and to making "household activities secondary," give meaning to the manner in which the words "take up necessary arms" were used. Such words cannot

3. Respondent's Own Direct Evidence Refutes Its "Inference" Theory.

One of the inferences which respondent would draw from the evidence is that the Communist Party advocates the violent overthrow of the Government. There is, however, direct evidence from the Government's own exhibits including the Constitution of the Party [Ex. 21, R. 1518] that the Party opposes this doctrine. This direct undisputed evidence is inconsistent with the suggested inference and the inference is therefore contrary to law. Moreover, it should again be noted that here, unlike *Dennis*, there was no prosecution witness to testify that the Party Constitution, with its express disavowal of the use of force and violence, had some different meaning or that these petitioners understood the language differently than from what was stated. When a case is based upon an inference, it "must fail upon proof of undisputed facts [the Constitution put in evidence by the respondent is undisputed] inconsistent with such inferences." *George v. Missouri P. R. Co.*, 213 Mo. App. 668, quoted with approval in *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 341. No conviction may be based on one opinion regarding an "economic theory about which there are two opinions supportable by plausible argument" *Maryland & Virginia Milk Producers Assn. v. United States*, 193 F. 2d 907, 916 (C.A. D.C., 1951).

4. The Legal Precedents Are Overwhelmingly Opposed to Respondent's Theory of Pyramided Inferences.

The law does not permit the foregoing foundational inferences as to the meaning of Marxism-Leninism and the nature of the Communist Party. Repeatedly the Courts have declared that they will upset judgments

affecting life, liberty and property where the results were predicated upon conjecture rather than proof. *United States v. Breitling*, 61 U. S. 252, 254; *Railroad Co. v. Houston*, 95 U. S. 697, 703; *The Folmina*, 212 U. S. 354, 363; *N. W. Pac. R. R. Co. v. Bobo*, 290 U. S. 499, 502; *Dennert v. United States*, 147 F. 2d 286 (C. A. 6, 1945); *Dahly v. United States*, 50 F. 2d 37 (C. A. 8, 1931); *Karn v. United States*, 158 F. 2d 568, 572 (C. A. 9, 1946). Even in a civil case, to avoid conjecture an inference must be consistent with the evidence and flow logically from it. In a criminal case the rule is more stringent. The facts must lead to the inference with such compelling force that it may lead a reasonable mind to fairly find guilt beyond a reasonable doubt. *United States v. National Ass'n. of Real Estate Boards*, 339 U. S. 485, 493; *Curley v. United States*, 160 F. 2d 229, 232-3 (C.A. D.C., 1947), cert. den. 331 U. S. 837; *Lempie v. United States*, 39 F. 2d 19 (C. A. 9, 1930); *United States v. Renee Ice Cream Co.*, 160 F. 2d 353 (C. A. 3, 1947); *Bryan v. United States*, 175 F. 2d 223 (C. A. 5, 1949), affirmed on other grounds, 338 U. S. 552. In a case involving the issue of free speech, the inference must meet the additional requirement of solidity of proof, and it can find no support in evidence of acts or utterances which may reasonably be inferred to be the exercise of protected freedoms. *Hartzel v. United States*, 322 U. S. 680; *Baumgartner v. United States*, 322 U. S. 665, *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; *Schneiderman v. United States*, *supra*, 320 U. S. 118.

Where in a free speech criminal case the judgment is predicated upon an inference drawn from proven facts, the record must be examined to ascertain whether that

inference so clearly follows from the facts, without the intervention of conjecture or surmise, that it can bear the burden of the judgment resting upon it. Where the inference relied upon lacks these solid roots deeply embedded in the established facts, the judgment cannot stand. *Boyd v. United States*, 142 U. S. 450, 458; *Clyatt v. United States*, 197 U. S. 207, 222; *Grau v. United States*, 287 U. S. 124, 128; *Gart v. United States*, 294 Fed. 66 (C. A. 8, 1923); *Wolcher v. United States*, 200 F. 2d 493 (C. A. 9, 1952); *Gold v. United States*, 36 F. 2d 16 (C. A. 8, 1929); *Norton v. United States*, 92 F. 2d 753 (C. A. 9, 1937); *Yusem v. United States*, 8 F. 2d 6 (C. A. 3, 1925); *Rossi v. United States*, 49 F. 2d 1 (C. A. 9, 1931); *Johns v. United States*, 195 F. 2d 77 (C. A. 5, 1952).

Here the respondent is forced to rely not only upon an inference lacking a solid base but upon a series of inferences piled precariously on top of the first one. The less closely and inseparably an inference is linked to a fact, the closer the inference approximates pure conjecture. It is for this reason that many courts have flatly declared that an inference must be drawn from fact, not from another inference.[75] "Conviction cannot

[75] *Manning v. Insurance Co.*, 100 U. S. 693, 698; *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 488; *Brady v. United States*, 24 F. 2d 399, 404 (C. A. 8, 1928); *Simon v. United States*, 78 F. 2d 454, 456 (C. A. 6, 1935); *J. W. Ringrose Co. v. W. & J. Sloane*, 266 Fed. 402 (D.C. E.D. Pa., 1920); *Westland Oil Co. v. Firestone Tire & Rubber Co.*, 143 F. 2d 326, 331 (C. A. 8, 1944); *Southern Railway Co. v. Stewart*, 115 F. 2d 317, 322 (C. A. 8, 1940), modified on other grounds, 119 F. 2d 85; *General Reinsurance Corp. v. Southern Surety Co.*, 27 F. 2d 265, 272 (C. A. 8, 1928); *Lincoln National Life Ins. Co. v. Erickson*,

be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt." *Rosenberg v. United States,* 120 F. 2d 935, 937 (C. A. 10, 1941). This rule simply requires that "Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed." *C. M. & St. P. Ry. Co. v. Coogan,* 271 U. S. 472, 477. Although the rule that one inference *may never* be founded on another has been subjected to criticism, its basic premise that inferences remotely rather than directly related to proven facts are untrustworthy is unquestionably sound. Where a whole series of presumptions are piled one atop another, the ultimate presumption is shaky indeed. It affords no support for any judgment (*Allen v. Trust Co. of Georgia,* 149 F. 2d 120, 127 (C. A. 5, 1945, aff'd 326 U. S. 630; *Cronin's Estate v. Commissioner of Internal Revenue,* 164 F. 2d 561, 565 (C. A. 6, 1947), let alone one requiring the solidity of proof which a First Amendment case demands.

Where knowledge is inferred, the facts upon which the inference is based must be proved directly. Otherwise the purported ascertainment of what lies inside a man's

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42 F. 2d 997, 1002 (C. A. 8, 1930); *Vernon v. United States,* 146 Fed. 121, 125-6 (C. A. 8, 1906); *Cf., United States v. Reginelli,* 133 F. 2d 595, 598 (C. A. 3, 1943); *Brown v. Maryland Casualty Co.,* 55 F. 2d 159, 160-1 (C. A. 8, 1932); *Tucker, et al. v. Traylor Engineering & Mfg. Co.,* 48 F. 2d 783, 786 (C. A. 10, 1931); *Equitable Life Ins. Co. of Iowa v. Halsey Stuart & Co.,* 112 F. 2d 302, 311 (C. A. 7, 1940), reversed on other grounds, 312 U. S. 410; *Gas Service Co. v. Hunt,* 183 F. 2d 417, 420 (C. A. 10, 1950); *Travellers Ins. Co. v. Warrick,* 172 F. 2d 516, 519 (C. A. 5, 1949); *Cunard SS Co. v. Kelley,* 126 Fed. 610 (C. A. 1, 1903).

mind is little more than suspicion. *United States v. Russo*, 123 F. 2d 420, 421-3 (C. A. 3, 1941); *Gargotta v. United States*, 77 F. 2d 977, 983 (C. A. 8, 1935). Likewise the process of "piling inference upon inference" condemns a finding of a state of mind inferred from knowledge which is itself inferred.[76] Here respondent's theory requires that an inference of knowledge be extracted from other inferences and that, not only the state of mind of an individual, but in addition the meeting of the minds of a group of alleged conspirators be inferred from the inferred knowledge, as part of a sequence of inferences all essential to a finding of guilt.

To sustain the convictions of petitioners, conjecture has been disguised to appear as proof. This disguise has been effected by a series of speculations playing the role of inferences, each of which totters on the insecure foundation of its predecessor. The Court in the *Schneiderman* case pierced a similar disguise and exposed the nakedness underneath. Said the Court:

> "Since it is doubtful that this [advocacy of violent overthrow of the United States Government] was a principle of these organizations, it is certainly much more speculative whether this was part of petitioner's philosophy [even though he was a member and officer]." (320 U. S. at 145.)

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[76] "Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes." *Direct Sales Co. v. United States*, 319 U. S. 703, 711.

C. Membership and Officership in the Communist Party, Together With Lawful Activities Therein, Leads to No Inference of Criminality—Section 4(f) of the McCarran Act and Respondent's Reliance Upon Guilt by Association.

If respondent's "inference" theory is untenable in imputing a reprehensible interpretation of Marxist writings to these petitioners without clear proof that petitioners adopted such reprehensible interpretation, this theory is made more unsound by respondent's contention that inferences of criminality can be drawn solely from membership and officership in the Communist Party, together with lawful activities therein.

At various stages of this case respondent has argued that it was not relying simply on the long-time membership and officership of each petitioner in the Party but upon the fact that each was shown to have been exceedingly active in the Party. But this merely adds a fact to the others upon which the structure of inferences is erected; it does not affect the piling on process itself. This is so because the activities shown are legal activities, such as engaging in election campaigns, adopting and supporting legislative programs, urging the adoption of certain policies in foreign affairs and so on. Even such activity as the holding of a Lenin Memorial meeting at which the Bill of Rights is discussed and Smith Act prosecutions condemned is legal, regardless of how unpopular such activity may be. No inference of guilt may be drawn from these innocent activities. *Langer v. United States*, 76 F. 2d 817, 827 (C. A. 8, 1935).

Enacted after the decision of the Second Circuit in the *Dennis* case, section 4(f) of the Subversive Activities

Control Act of 1950 (50 U.S. C.A. 783(f)) makes explicit that which is implicit in the *Dennis* opinions—that membership or position in the Communist Party, together with lawful activities therein, standing alone cannot establish guilt. Its legislative history demonstrates a Congressional purpose to fashion out of section 4(f) a protection against compulsory self-incrimination and guilt by association. Obviously this section was adopted in an attempt to avoid impairment of Fifth Amendment rights in the statutory scheme for compulsory registration of members of "Communist" organizations. Early in the history of the legislation before the Senate,[77] it was pointed out that the registration requirements might well compel self-incrimination under the penal provisions of another section of the same bill (Senate Report No. 1358, 81st Cong., 2d Sess., Letter of John W. Davis, Esq.). The Committee on the Judiciary reported that both Senate bills were drafted to meet the "constitutional objections of John W. Davis." Thus, the Committee attempted a remedy which it termed a "specific bar to self-incrimina-

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[77]This is Title I of the Internal Security Act of 1950, Act of September 23, 1950, c. 1024, 64 Stat. 987. Section 1(a) of Title I provides, "This title may be cited as the 'Subversive Activities Control Act of 1950'." Title I was codified at 50 U. S. C. A. 781 ff.

There were two closely identical bills before the Senate, S. 2311 and S. 4037. As is below indicated, the two measures were merged in the course of consideration by the Senate. Later, the merged measures were taken up in conference with House members, together with a similar bill, H. R. 9490, from which the final legislation emerged. Senate and House reports on all three bills are accordingly material here. They are designated as follows. Senate Report No. 1358 (to accompany S. 2311), 81st Cong., 2d Sess.; Senate Report No. 2369 (to accompany S. 4037), 81st Cong., 2d Sess.; House Report 3112 (Conference Report), 81st Cong., 2d Sess.

tion written into Section 4(f)" (Senate Report 1358, *supra*, pp. 20-21).[78]

Simultaneously the framers of the legislation avowed marked solicitude to avoid guilt by association. In its report on S. 2311 the Committee on the Judiciary claimed that the bill satisfied the test laid down by the Supreme Court in *Knauer v. United States*, 328 U. S. 654, and quoted from the majority opinion the portions reaffirming the rule against proof by imputation and upholding the denaturalization of Knauer as based upon a "pattern of conduct" and "overt acts," rather than membership in an organization. In this respect the committee said that "Section 4, requires individually incriminating evidence

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[78]At that stage of the legislation, however, Section 4(f) applied to no other criminal statute than the proposed statute of which it was a part (Senate Reports No. 1358, *supra*, p. 17, and 2369, *supra*, p. 17). That the registration provisions raised self-incrimination difficulties also with respect to the Smith Act was brought to the attention of the Senate in the minority report on S. 4037 (Senate Report No. 2369, *supra*, p. 13) and in the debate (96 Cong. Rec. 14491, 14500). Similarly in the House debate on H. R. 9499, it was objected that the bill failed to provide protection against self-incrimination with respect to the Smith Act (96 Cong. Rec. 13739). Thereupon the author of the bill, who was also the chairman of the committee reporting it, offered an amendment which added the language "or for any alleged violation of any other criminal statute." The amendment was agreed to without further debate or explanation (96 Cong. Rec. 13761). The Conference Report carried this change, in substance, over into the bill as finally enacted (House Report No. 3112, *supra*, p. 7).

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this section *or of any other criminal statute*. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received as evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation *of any other criminal statute*. Sept. 23, 1950, c. 1024, Title I, Sec. 4, 65 Stat. 991." (Emphasis supplied.)

of active participation in the activities prohibited" (Senate Report No. 1358, *supra,* pp. 19, 20).

The same committee drew upon the learning of Donald R. Richberg, Esq., in this connection and appended his memorandum to its report. His language makes plain the purpose to avoid convictions of crime based upon membership alone or together with constitutionally protected conduct:

> "It is true that a member of a political party or other loose organization should not be held responsible for personal violations of law by some officer or other member of the organization, *in which he did not participate or which he did not help to conceal* . . .
>
> "It will be seen that no individual is made guilty because of mere association with others. *He must do something himself which is made unlawful* . . .
>
> ". . . Since such an organization (*i.e.,* a 'Communist organization') is not outlawed it is evident that mere educational propaganda and campaigns for political reforms or to elect candidates to public offices are not made unlawful . . ." (Senate Report No. 1358, *supra,* pp. 32, 33; emphasis supplied.)

During the debate in the Senate, Senator O'Connor, a proponent of the bill and a member of the Committee on the Judiciary, stated that it was the purpose of the bill to make punishable "only overt acts" and to require "substantial evidence that the accused is engaged in an activity which is aimed at the overthrow of our form of government" (96 Cong. Rec. 14257).

It would therefore appear that the framers of the legislation purposed not simply to forbid convictions under "any . . . criminal statute" based upon mere membership or officership in the Communist Party, but also to

prohibit such convictions without evidence of actual participation in the activities which the statute proscribes. Membership and officership in the Party being *per se* lawful, they cannot impose criminality upon lawful activities; and the activities being in and of themselves lawful they cannot infect the lawful membership and officership. No matter how the formula is arranged, lawful activities and association not shown to be unlawful cannot by addition or multiplication be cemented into illegality. *Bridges v. Wixon*, 326 U. S. 135, 147; *Cf., United States v. Food and Grocery Bureau of So. Calif.*, 43 F. Supp. 966, 973 (D.C. S.D. Cal., 1942). Any other rule would permit a finding of guilt without proof of any incriminating fact and would thereby actually create a presumption of guilt. This the presumption of innocence does not permit. *Mitchell v. United States*, 88 U. S. 350, 353.

In urging that innocent activities within the Communist Party may properly lead to an inference of criminality, the respondent places its reliance upon the abhorrent dragnet device embodied in the doctrine of guilt by association. In conspiracy cases no less than in others "Guilt with us remains individual and personal." When individuals are tried in groups "every safeguard to individualize each defendant in his relation to the mass" is imperative. *Kotteakos v. United States*, 328 U. S. 750, 772-3. With respect to these very petitioners, in an earlier proceeding in this case it was said "Each defendant stands before the bar of justice as an individual. Even on a conspiracy charge defendants do not lose their separateness or identity" (Mr. Justice Jackson and Mr. Justice Frankfurter concurring in *Stack v. Boyle*, 342 U. S. 1, 9).

An inference of participation in an illegal conspiracy drawn from lawful activities in association with others predicates guilt upon the association alone. This the law forbids in any conspiracy case. *Butler v. United States*, 197 F. 2d 561, 564-5 (C. A. 10, 1952). Freedom of association in a speech case may not thus be impaired without serious inroads into the truths we cherish as essential to a free nation. Yielding on the principle of freedom of association requires abandonment of the concept "that under our traditions beliefs are personal and not a matter of mere association." *Schneiderman v. United States*, 320 U. S. 118, 136. "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." *Wieman v. Updegraff*, 344 U. S. 183, 191.

Freedom of speech can be exercised effectively only in a context of freedom of association. If speech may be tainted on the basis of association, the right to speak is lost together with the right to associate. They are cognate liberties, inextricably bound one to the other. "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relationship of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." *DeJonge v. Oregon*, 299 U. S. 353, 365. See also *Herndon v. Lowry*, 301 U. S. 242; *Cantwell v. Connecticut*, 310 U. S. 296; *Taylor v. Mississippi*, 319 U. S. 583; *Keegan v. United States*, 325 U. S. 478; *Burstyn, Inc. v. Wilson*, 343 U. S. 495; and *Baumgartner, Hartzel, Schneiderman* and *Klapprott, supra*.

It follows from all that has been said that the nature of each petitioner's activities as shown by the record must be scrutinized with great care to determine whether petitioner's connection with a conspiracy is supported by the evidence. If the activities are legal and particularly if they were carried on within the realm of the First Amendment, the judgment must fall. "Free discussion of the problems of society is a cardinal principle of Americanism—a principle we are zealous to preserve." *Pennekamp v. Florida*, 328 U. S. 331, 346 (citing *Murdock v. Pennsylvania*, 319 U. S. 105, 115; *West Virginia v. Barnette*, 319 U. S. 624, 639; *Thomas v. Collins*, 323 U. S. 516, 527, 530). Some of the First Amendment activities of petitioners may have appeared to respondent to be unwise or intemperate or unpatriotic. The holding of a Lenin Memorial meeting may have been classified as politically reprehensible by respondent. But no matter how such activities may be characterized, they were protected by the First Amendment. *Terminiello v. City of Chicago*, 337 U. S. 1; *Cantwell v. Connecticut*, 310 U. S. 296. The activities of all of the petitioners, as shown by the record, consisted of the lawful exercise in and through the Communist Party of First Amendment rights within the political arena. The practical effect of the convictions is to impair the right of free speech of these petitioners because of the fact that they are Communists and their protected activities were carried on as such. Communists have the same right to speak as all other persons and that right is not forfeited because they speak in and through their organization. Otherwise the "auspices" of speech rather than whether the "utterances transcend the bounds of freedom of speech which the Constitution protects" would determine the right to speak.

To apply the "auspices" test to any petitioner is the use of the Smith Act to deprive him of "the essence of his guaranteed personal liberty." *DeJonge v. Oregon*, 299 U. S. 353, 365-6. A law "so construed and applied, goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom." *Herndon v. Lowry*, 301 U. S. 242, 258-9.

D. The Evidence Does Not Establish the Conspiracy Charged.

Not only is the evidence insufficient to establish any petitioner's connection with the conspiracy charged; it is insufficient to establish the conspiracy itself. With one exception,[79] the sum of the evidence, considered above, of the activities of the petitioners and of their co-petitioners during the period of the alleged conspiracy must be totalled to determine whether a conspiracy is made out as against any petitioner. *Keegan v. United States*, 325 U. S. 478, 488. As a minimum, essentially the same evidence required to establish the connection of two or more defendants with the conspiracy charged is essential to a finding of the existence of the conspiracy. The conspiracy cannot be proved through acts or declarations of alleged co-conspirators of the petitioners. *Bartlett v. United States*, 166 F. 2d 920, 924-5 (C. A. 10, 1948);

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[79]The evidence of the 1950 incident involving the question put by the F.B.I. agent as to whether a revolution was being planned by "bullets instead of ballots" (see p. 76, *supra*) was offered against petitioner Lambert only [R. 7620-1, 7671]. It may not be considered in determining the sufficiency of the evidence to establish the conspiracy, because that would require treating it as if it had been offered against all petitioners.

Wilson v. United States, 109 F. 2d 895, 896 (C. A. 6, 1940).

We do not consider here the specific evidence of the activities of the co-petitioners, which is dealt with in their own briefs. An examination of those briefs will reveal, we believe, that the evidence concerning co-petitioners' activities relevant to the manifestation of the alleged conspiracy adds nothing of substance to the evidence discussed in this brief.

There being no direct evidence of an agreement to embark upon the condemned enterprise, it is necessary to refer to the circumstantial evidence consisting of the activities of these fourteen individuals over a period of almost eleven years, the period during which it is charged the conspiracy was in existence. For this entire period there are not more than eight or nine ambiguous, equivocal and isolated statements attributed to some of the petitioners, by the paid testimony of hired informers or professional witnesses speaking from their hostile and untrustworthy memories, which so much as suggest the possibility that force and violence was referred to by any petitioner. In the three year period within the statute of limitations there is not a single such statement. For the very same reasons that this testimony does not suffice to establish any petitioner's connection with the conspiracy, it is insufficient to prove beyond a reasonable doubt or at all the existence of the conspiracy itself.

There is an additional and fatal deficiency in the evidence relating to the conspiracy. No matter what the individual petitioners said or did, absent adequate proof of "an actual agreement in the sense of a meeting of minds in the pursuit of a course of action according to a

common plan"[80] to engage in the forbidden advocacy, there can be no valid finding that the conspiracy existed. This proof may be circumstantial but it must exist and it must consist of more than the unrelated activities or chance statements of the petitioners; it must establish participation in the conspiracy "with knowledge of the agreement" *Dickerson v. United States,* 18 F. 2d 887, 893 (C. A. 8, 1927); *United States v. Tannuzzo,* 174 F. 2d 177, 179-80 (C. A. 2, 1949), cert. den. 338 U. S. 815; *United States v. Crimmins,* 123 F. 2d 271, 273 (C. A. 2, 1941); *Davidson v. United States,* 61 F. 2d 250, 253 (C. A. 8; 1932); *Linde v. United States,* 13 F. 2d 59, 61 (C. A. 8, 1926). As Judge Medina stated in *United States v. Morgan,* 118 F. Supp. 621, 634 (D.C. N.Y., 1953): "But, when all is said and done, it is the true and ultimate fact which must prevail. Either there is some agreement, combination or conspiracy or there is not. The answer must not be found in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case . . ." To predicate a finding of conspiracy on arbitrary assumptions with respect to the requisite common understanding violates due process. *Morrison v. California,* 291 U. S. 82, 92-3.

If the sprawling and pervasive character of circumstantial evidence admitted in a conspiracy case is to be kept within limits promising some degree of certainty in the proof required to sustain a conviction, the evidence

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[80]Cousens, *Agreement As An Element in Conspiracy,* 23 Va. L. Rev. 898, 911 (1937); see also *Pinkerton v. United States,* 328 U. S. 640, 649 (1946), Mr. Justice Rutledge dissenting in part; *United States v. Andolschek,* 142 F. 2d 503, 507 (C. A. 2, 1944); *United States v. Crimmins,* 123 F. 2d 271, 273 (C. A. 2, 1941).

bearing upon a common understanding must be sharply delineated and its sufficiency evaluated. An indispensable prerequisite for this task is the precise definition of the joint enterprise charged in the indictment. Here it is the advocacy of violent overthrow of the Government and the organization of the Communist Party as a vehicle for that advocacy. The Communist Party is not the conspiracy and its organization *per se* is not an act pursuant to the conspiracy. Accordingly membership in the Communist Party is not membership in the conspiracy and joint action in the Party is not proof of the conspiracy. Only joint action directed towards the proscribed advocacy and to organize the Communist Party to *that* end, not some other, is probative of the existence of the conspiracy charged.

Assuming arguendo that some of the evidence relating to some of the petitioners could be said to support a finding, as to those individuals, of an intent to advocate violent revolution, there is no evidence whatsoever of a *common* plan to that end. The Communist Party, not being the conspiracy, the common membership therein given its largest scope is some evidence from which an inference of opportunity to conspire might be drawn. But that is not enough. The inference of opportunity is buttressed by no proof of its use by petitioners. The few isolated, equivocal disconnected incidents where revolution was discussed by or in the presence of a petitioner or where the language might by a strained construction be deemed to refer to violent revolution are empty of any common pattern in subject matter, manner of approach, circumstances of the utterance, timing or any other factor necessary to supply a foundation for an inference of a common design.

be torn from their context. This evidence, if believed, is proof certain of a rhetorical bent in the speech of this petitioner; it is concrete proof of nothing more—for her statement is as susceptible, if not more so, of a rhetorical construction as of any other.

In context, a reprehensible interpretation is unreasonable. According to the evidence, petitioner posed the necessity of women making their "household activities secondary" to the taking up "of the necessary arms side by side with the men." Making household duties "secondary" is certainly more consistent with expenditure of time in political activity than it is with the concept that women should become part of an attempt to overthrow the Government by violence. The testimony of this alleged oral declaration like the others found its way into the record after being filtered year by year through the understanding, recollection and bias of an exceedingly well paid informer—Timothy Evans (see pp. 88-89, *supra*). Such evidence affords no solidity for the series of inferences which are necessary if it is to support an ultimate finding of this petitioner's connection with the conspiracy charged.

These three alleged oral declarations, all outside the statute of limitations, constitute the only evidence of what the petitioner Stack said or did during this period.

(b) *Petitioner Spector.* The testimony that in 1945 or 1946, petitioner Spector while teaching a class gave specific reading assignments is one of the very few instances of any petitioner being directly associated by the evidence with particular Marxist-Leninist writings. One of the books referred to by petitioner Spector was "Foundations of Leninism" [Ex. 1, R. 1357]. It is

among the writings that petitioner Yates testified are part of a whole body of literature which she understood as not calling for the violent overthrow of our Government. The concepts embodied in this particular work are identical with and are just as open to this tenable conclusion as were those before the Court in *Schneiderman v. United States,* 320 U. S. 118, 148-58.

The petitioner simultaneously recommended for reading "The United Front Against Fascism" [Ex. 119, R. 661] which projected for the United States a program of peaceful political action, thus negating any inference that respondent would draw that the reference to "Foundations of Leninism" was tantamount to advocating the overthrow by force of our Government. Respondent assumes that petitioner Spector adopted the broad generalizations drawn from experience under highly autocratic and corrupt governments (contained in "Foundations of Leninism") as applicable to the United States instead of the specific proposals (made in "United Front Against Fascism") directed to actual conditions in the United States where political parties could freely compete for public acceptance. The former book itself emphatically warns that it is not to be warped by such undiscerning neglect of social and political reality: "Unable to approach the phenomena of real life concretely, some comrades who suffer from mental laziness substitute general, noncommittal *formulas* for a careful concrete study of the actual situation and the relationship of class forces" [p. 101; Ex. 119, R. 661; R. 1122].

Moreover the pamphlet on the United Front was dated eleven years later than the one on Leninism and was obviously presented by the petitioner as a more recent

view of Marxism-Leninism. Even more important it insists upon the reconstruction of "policies and tactics in accordance with the changing situation" [p. 93, Ex. 119, R. 661; R. 1120]. This entire pamphlet is predicated upon the proposition that the rise of fascism brought about a new world situation; it deals with a specific program of action (including for the United States the use of existing democratic channels to elect a people's front government to bring about desired changes) in the light of the new situation. When the recommended reading is considered together, as it must be (*Kammann v. United States*, 259 Fed. 192, 193 (C.A. 7, 1919), the reasonable inference which this evidence permits that this petitioner intended to advocate change through the democratic process precludes a contrary conclusion. *Schneiderman v. United States*, 320 U. S. 118; *Baumgartner v. United States*, 322 U. S. 665; *Knauer v. United States*, 328 U. S. 654.

The reading was recommended and was done in a Communist Party class. According to the respondent's theory the Communist Party is the very medium utilized by the conspirators for their claimed nefarious purposes. Certainly at this very class to which respondent's witness testified the true intent and purpose of the conspirators would be revealed rather than concealed. Yet there is not a single word of evidence indicating that the petitioner interpreted the writing as advocating the overthrow of the Government of the United States by force and violence. The "absence of overt acts" or declarations indicating that petitioner had adopted a blameworthy construction of the recommended reading decisively refutes respondent's contention (*Schneiderman v. United States*, 320 U. S. at 158-9).

The unsound inference that petitioner Spector understood the books involved to have the meaning respondent ascribes to them is but the first in a series of inferences essential to respondent's case. It must next be inferred that the reading was assigned for the purpose of making that understanding apparent to the students; next, that the purpose of making it apparent was to prepare the students to advocate or engage in acts of violence; next, that all this was done pursuant to a common design with the other petitioners and finally that this common design and petitioner's connection therewith thus found to have been present in 1945 or 1946 continued until 1948. The evidentiary facts testified to by a paid informer and the conclusions drawn by respondent thus separated from each other by a series of untenable or disputable inferences would substitute speculation for proof.

(c) *Petitioner Yates.* The "Mother Bloor" incident in 1945 (pp. 32-36, *supra*) and the one involving the 1947 raffling of the book [Ex. 251, R. 7810] "The History of the Civil War in the U. S. S. R." (pp. 36-37, *supra*) were both related in the testimony of the paid informer Daisy Van Dorn. The inner contradictions in the tales recounted by this witness, as well as the inconsistencies between her testimony and stipulated facts or other undisputed evidence, give them a quality of improvisation wholly inconsistent with veracity. If this testimony is to be given any weight, it must be found that the Party went to the trouble of smuggling into the United States 500 copies of a book, which had actually been cleared through Customs and copies of which were circulated by the Public Library of Los Angeles; that of 6 illicit copies allotted to California, one copy was raffled off at ten cents a chance at a minor and insignificant club meet-

ing; that, thereafter, the full significance of this book became apparent to the lucky winner, a paid F.B.I. informer, only upon a chance discussion with state or county officials of the Communist Party. An examination of the exhibit itself will reveal the complete absurdity of the whole story. It could no more constitute, to a sane person, a blueprint for revolution in the United States than a blow by blow account of the Civil War in France could have been used as an outline for the Civil War in the United States.

If this witness' testimony is trustworthy, the Communist Party planned a conspiratorial meeting, so highly confidential that ordinary rank and file members of the Party were to be kept unaware of it,[72] by scheduling it at the home of a non-Communist, by sending out printed announcements of the meeting and by inviting Daisy Van Dorn, who at that time had been a member of the Party for one month; at this highly conspiratorial meeting non-members of the Party, hostile to its alleged purposes, and chance drop-ins were present and photographs were taken of those in attendance; the speaker, appropriately enough an 83 year old woman known as Mother Bloor, mourned the death of President Roosevelt stating "we don't know about Truman, but we are going to give him a trial," while simultaneously inviting the audience to join her in the "bloody battles" of what she characterized as a "wonderful revolution" in order "to take over this country and run it in a socialistic manner"; in the

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[72]This apparently involved the rather neat device of utilizing the Communist Party to advocate violent revolution by concealing that fact from the rank and file of its members.

course of a speech in which she declaimed the glory of blood flowing in the streets she cautioned those present (Communists and non-Communists alike) that in order to be "a good Red Bolshevik" one must speak "slick, sly and smooth" and of course not roughly because people cannot be won that way; in this speech she said, on the one hand, that she hoped to live to see the peace-loving nations of the world, then gathered in San Francisco to form the United Nations, achieve "the final victory over the forces of fascism" and on the other that she "was so happy at being in San Francisco at this time on the eve of our great rebellion . . ."

(d) *Petitioner Carlson.* The witness Estrada testified that in 1947 petitioner Carlson talked of overthrowing the Government when in fact, as revealed by the contemporaneous written report prepared by the witness for the F.B.I., the petitioner spoke of resistance to fascism. The witness explained the apparent contradiction by saying that he equated resistance to fascism with overthrow of the Government (see pp. 54-55, *supra*). The witness Estrada thus distorted an incident into its opposite. If the written report had not been available, the petitioner Carlson would now be before this Court with unimpeached testimony against him, of his adherence to the use of guns in accomplishing a revolution in the United States. The record would not disclose that this had been fabricated out of his statements of support to Negro resistance against lynching and of opposition to "revolutionary action by the Fascists". Only rarely will a record so clearly reveal the wisdom of the proposition that the unreliability of evidence of unsworn oral declarations is redoubled when the declarations are filtered through

the uncomprehending mental processes of hostile informers.

(e) *Petitioner Fox.* In 1946 the petitioner Fox is reported to have said that he favored the "overthrow of this lousy system" but "the time and place for militant action . . . — had not arrived yet." Only by reading the concept of force and violence into these words is it possible to attribute to them any unlawful significance. The words "overthrow" and "militant" do not necessarily imply force and violence and the "overthrow" of a "system" is to be distinguished from the "overthrow" of a Government. Not only did the respondent fail to sustain its burden of proving that petitioner Fox was talking about *forceful* overthrow of the *Government* of the United States, but the circumstances under which the statements were allegedly made repel such a conclusion. Petitioner Fox spoke in response to the arguments of "leftists" who wanted to advocate socialism now without regard to the wishes of the majority of the people. The speaker regarded the position of the leftists as a mere "whim" and indicated that he desired to act militantly when the time came. In context this time referred to a period when the majority of the people desired the establishment of socialism, which militant action could be accomplished by peaceful means because it had majority support. At the very least, the language is as susceptible of this interpretation as it is of any other. Only by basing a series of inferences upon an arbitrary construction of the language as referring to overthrow of the Government by violence can the respondent impute guilt on this evidence.

B. Membership and Innocent Party Activities—the Only Substantial Evidence Against Any Petitioner—Respondent's Theory.

The charge is that the conspiracy began in 1940. For the eleven year period up to the time of the return of the indictment, there is, in addition to the evidence discussed above and relating only to petitioners Yates, Stack, Fox, Carlson and Lambert, only evidence of each of the petitioner's membership and officership in the Communist Party plus constitutionally protected activities therein. As the analysis of the strongest evidence against the five petitioners named above indicates, there is nothing in their declarations or activities which could sustain a finding of their connection with the conspiracy charged. The evidence which must be relied upon by respondent as to them and of course as to the remaining six petitioners, to establish such connection is membership, officership and activity in the Communist Party having no apparent relationship to advocacy of force and violence. This explains the reliance of the court below on testimony of participation in a Party Lenin Memorial called in support of the Bill of Rights and to protest the *Dennis* prosecution as an illustration of the kind of evidence held sufficient to establish a petitioner's connection with the alleged conspiracy as well as his specific intent to advocate and effectuate the violent overthrow of the Government.

Since the record is actually devoid of direct or circumstantial evidence which sufficiently establishes the guilt of each of the petitioners, respondent relied upon an abstract theory of guilt which was adopted by the courts below. The theory is bottomed upon a series of inferences pyramided by the respondent from proof alone of membership and officership in the Communist Party and

lawful activities therein. We discuss now the invalidity of this theory. Petitioners analyze, first, the theory in general. Then follows a discussion demonstrating that respondent's theory as to the inferred unlawful understanding and interpretation of Marxist writings is invalid both in fact and in logic. We show, further that respondent's own direct evidence refutes the baseless inferences which it draws. Then there is included a discussion of the legal precedents which uniformly condemn the process of conjecture, surmisal and guesswork in which the respondent and the courts below indulged.

1. Respondent's Abstract Theory of Guilt.

The convictions rest upon no evidence of express agreement to advocate the proscribed doctrine. Nor are they predicated upon any actual advocacy by these petitioners, whether in concert *inter se* or with others of the violent overthrow of the Government. The theory of respondent and of the courts below is based upon three proven facts: first, the Communist Party officially declares that "it subscribes to the principles of scientific socialism, Marxism-Leninism"; second, Marxism-Leninism is composed of a large body of writings, some of which speak of violent revolution in historical context, but none of which state that the Government of the United States should be overthrown by force and violence, and most of which repeatedly declare that the language in the writings is not to be taken literally and that the application of the principles of Marxism-Leninism depend upon time, place and circumstances; third, the petitioners were long-time Party members and officers, actively engaged in legal activities of the Party.

Upon the foundation offered by these facts, respondent has consistently sought throughout these proceedings to erect the following complex pyramid of inferences: first, Marxism-Leninism must be construed as calling for the violent overthrow of the Government of the United States; second, on the basis of this inference as to the meaning of Marxism-Leninism, it must be inferred that the Communist Party because of its advocacy of Marxism-Leninism advocates the overthrow by violence of the Government of the United States; third, from this inference as to what the Communist Party advocates, it must be inferred that long-time members and officers of the Party, including each of the petitioners, knew that the doctrines of Marxism-Leninism as construed by the Communist Party called for violent revolution in the United States; fourth, from this inference of each individual's knowledge, there must be an inference that each individual agreed with Marxism-Leninism and the objectives of the Party as thus construed; fifth, from this inference of individual agreement with the inference of the proscribed advocacy, an inference must follow that each of the petitioners entered into an agreement with the others to engage in such advocacy and to organize the Communist Party for that purpose.[73]

This remarkable series of inferences circle into a noose from which no long-time member of the Communist

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[73]From the inferred agreement to advocate violent overthrow of the Government and to organize the Communist Party to that end, it must be inferred that the agreement embraced a plan to advocate in language of incitement to action. This was respondent's position in the trial court when it proffered its instruction on incitement (see *supra*, p. 112, n. 69). A required seventh inference on the individual specific intent to accomplish the violent overthrow of the Government as speedily as circumstances would permit, will be discussed *infra*.

Party can free himself. It starts with inferences as to the purposes of the Party, passes on to inferences of conspiracy by individuals because of their membership in the Party and returns to inferences as to the purposes of the Party resulting from the inferred conspiracy of the members of the Party. All that is necessary to set in motion this chain of perpetual inferences is proof of membership in the Party and quotations from a pile of books. And the advantage of this methodology is that it creates the illusion that no one is being convicted merely because of Party membership or officership and that books are not on trial, while it permits the desired result to be achieved solely through proof of such membership and books. Nor does it matter that the various inferences are highly disputable and that they do not necessarily follow from the facts or the preceding inferences.

2. The Inferences Drawn by Respondent as to the Understanding and Interpretation of Marxist Writings, Imputed to Petitioners Without Evidence, Are Untenable in Fact and in Logic.

The inference that Marxism-Leninism equals advocacy of overthrow of the Government of the United States by force and violence is, according to the record in this case, a vulgarization of a complex system of human knowledge and beliefs which has been variously interpreted and applied depending upon the views of different individuals and groups and according to the diverse circumstances and conditions applicable at any given time. "The term Marxism-Leninism means the sum total, the teachings, policies and program of the Communist Party, the teachings of Lenin, Stalin, Marx, Engels, the programs of

the Communist Internationals, the sum total of the Communist Party program and policy as taught and advocated by the foremost exponents of Communism"—so speaks a prosecution witness [R. 2311]. This witness concedes that Marxism-Leninism has been elaborated on, correctly or incorrectly, in a thousand different ways by thousands of different people, and that what may appropriately be included within Marxist-Leninist writings is sometimes a matter of disagreement even among Communists; that these thousands of writings touch upon such diverse subjects as economics, politics, ethics, philosophy, science, art, culture and a variety of other matters; that not only is there often disagreement as to whether a particular writing conforms to the principles of Marxism-Leninism, but the concepts themselves are subject to constant change and development and the various writings attempt to apply the principles of Marxism-Leninism to specific problems and specific conditions at specific times [R. 2571-2602, 2625].

Nor, as another prosecution witness points out, is it a simple matter correctly to interpret Marxist-Leninist writings; for example, it takes more than one reading of Dimitroff's "Report on the United Front" to understand it because one reading might result in a wrong interpretation [R. 2657-9]. Even after reading and study, differences persist. A third prosecution witness testified that at an educational discussion of "The Paris Commune" [Ex. 492, R. 4408], there were pro and con views by members of his branch who differently interpreted certain features of this work [R. 4425-26]. "In each country individuals interpret and apply Marxism-Leninism to a given situation in a given territory in a

given time," is the testimony of still another prosecution witness [R. 2572].

The existence of differences among those who interpret Marxism-Leninism, and particularly among members of the Communist Party, is a bar to any inference from proof of membership and officership in the Communist Party, that any Communist Party member accepted one particular view of Marxism-Leninism. Here there is no direct evidence establishing or from which it may be fairly inferred that any petitioner understood Marxism-Leninism or the purposes of the Communist Party as incorporating the banned advocacy. There was much clear and unequivocal evidence to the contrary supported by quotations from Marxist-Leninist writings and official utterances of the Party. The inferences relied on by respondent require either the complete ignoring of the Party's position that socialism can only be achieved when the majority of the people desire it, as exemplified in part by the expulsion of the leftists who disagreed with this view, or the absurd conclusion that because Marxist writings supported the use of violence to achieve change in Czarist Russia when no democratic channels were available, these writings *must be construed* as insisting on violence in the United States even though the majority have available democratic channels through which changes can be effected.

In addition, some of the respondent's own witnesses indicated their own understanding when they were Party members that the application of Marxism-Leninism to the United States did not call for force and violence but proposed change through the democratic process, and some of these witnesses held office in the Party (see p.

95, *supra*). If a prosecution witness could have believed as a member and officer of the Communist Party that it advocated peaceful change, on what reasonable grounds may it be inferred that petitioners here understood the exact opposite by virtue of their relationship to the Communist Party?

Perhaps most important of all, these inferences realistically are irreconcilable with the absence of direct evidence that any petitioner personally taught, discussed or advocated a violent revolution in the United States. It has often been noted that, because conspiracies operate in secrecy, proof thereof must generally depend upon circumstantial evidence. Here, however, the eleven alleged conspirators for a period of eleven years were under the direct observation of paid representatives of the F.B.I. and of members of the Party who later became professional witnesses for the respondent. These bona fide and bogus members of the Party operated within the Communist Party, the organ of the alleged conspiracy—the place where its objects would necessarily be made known, if the conspiracy existed.

Respondent's theory is that the conspirators planned to use the Communist Party as an instrument for preparation of Party members for advocacy of the violent overthrow of our Government. The most logical place for the indoctrination requisite to the conspiracy was the Party schools. Yet for the entire eleven year period there is no evidence that any one of the eleven petitioners at any school or elsewhere said anything about violent revolution. Nor is there any evidence that anywhere any time, any petitioner stated that adherence to Marxism-Leninism or to the Communist Party required advocacy

of the forceful overthrow of the Government. The hired political spies and other hostile witnesses available to respondent had ample opportunity to observe what petitioners were doing within the inner workings of the alleged conspiracy and their testimony was hardly more favorable to the petitioners than the facts warranted. If respondent's theory had any factual substance, one would reasonably expect these petitioners, alleged leaders of the claimed conspiracy, to have made numerous clear-cut statements indicating their adherence to the doctrine of violent revolution in the United States. Under these circumstances, the absence of any evidence of such statements affords strong support for the conclusion that petitioners were not parties to an agreement to engage in the forbidden advocacy. *United States v. Di Re,* 332 U. S. 581, 593; *Wesson v. United States,* 172 F. 2d 931, 936 (C. A. 8, 1949).

The fact of the matter is that ideas, opinions, beliefs, philosophies and other concepts, when embodied in writings which flow out of particular and different historical settings, can have no single meaning and interpretation to all persons at all times. Proof of any individual's understanding and interpretation of writings which have "perplexed courts, administrators, legislators and students" (*Schneiderman v. United States,* 320 U. S. 118, 147) can only be established by proof of the individual's own "overt acts" clearly and unequivocally indicating his interpretation and understanding (*id.,* pp. 158-9). The absolute language of the First Amendment, for example, when examined in historical context, has been variously understood and interpreted by responsible citizens. See, the discussion by Justice Frankfurter in

Dennis v. United States, 341 U. S. 494, 521-5, and the differences in interpretation between Professors Meikeljohn and Chafee, noted in the same opinion (*id.*, p. 524, n. 5). The Thirteenth Amendment prohibits involuntary servitude, but despite the express language it has been interpreted and understood as not preventing military conscription. Chafee, *Free Speech in the United States* (1941), p. 8. If freedom of speech, press and assembly is to be preserved, it must be clear that persons cannot be imprisoned because of interpretations and understandings of writings imputed to them by a prosecutor, without clear and convincing proof of the accused's own acts and declarations adopting such understanding or interpretation.[74]

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[74]Referring to the Sedition Act of 1798, Madison stated: "But in the next place, it must be obvious to the plainest minds, that opinions and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinion, and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a court of law." *Report on the Virginia Resolutions* in Elliot's Debates, vol. IV, p. 575. Thomas Clio Rickman, publisher of Paine's *Rights of Man*, wrote "on the absurdity of trial by jury in matters of opinion, and the folly of any body of men deciding for others in science and speculative discussion, in politics and religion. Is it not applying the institution of juries to purposes for which they were not intended, to set up twelve men to judge and determine for a whole nation on matters that relate to systems and principles of government? A matter of fact may be cognizable by a jury, and certainly ascertained with respect to offenses against common law and in the ordinary intercourses of society; but on matters of political opinion, of taste, of metaphysical inquiry, and of religious belief, everyone must be left to decide as his inquiries, his experience, and his conviction impel him." *Writings of Thomas Paine* (Wheeler ed., 1908), vol. I, p. 49.

It will be urged that the petitioners' common enterprise may be found beyond a reasonable doubt from a finding of mutual adherence to Marxism-Leninism. Aside from the pyramiding of inferences required to reach this conclusion, the argument as a practical matter treats the Communist Party as the conspiracy and must fail for that reason. Or worse yet, it treats adherence to Marxism-Leninism as the connecting link between the petitioners, thus creating a giant conspiracy embracing everyone who subscribes to this body of thought. In either event the conspiracy loses all form and becomes a legal weapon with no more precision in selecting its objectives than is possessed by an atomic bomb. It envolops an entire area of human beliefs and endangers all those whose thoughts might venture within its broad limits.

The theory of conspiracy here is on this score quite different from *Dennis*. In that case this Court rested its decision upon the "necessary finding" that a small compact group of men, "the leaders of the Communist Party in this Country" utilized their control of the Communist Political Association "to transform that organization into the Communist Party" and to establish for it "a policy which worked for the overthrow of the Government by force and violence." Those defendants were all members of the same governing body of the Party and whatever they did was done jointly.[81] Thus in *Dennis* the result was predicated not simply upon the defendants' position of control of the Party apparatus, but their claimed use of that position *jointly* to plan and carry out their agree-

[81] Whether a review of the evidence in that case by this Court would have shown, as petitioners believe, that the record did not support, by clear and convincing evidence, the conclusion accepted by the Court is immaterial as far as this case is concerned.

ment to engage in the unlawful advocacy (341 U. S. 494, 498).

There is no comparable evidence in this record. Petitioners are shown to have held a variety of offices in the Party at different levels and with different titles and responsibilities. They are represented neither to have operated as a homogeneous group exercising common powers nor to have jointly organized or determined any policies for the Communist Party. They were never members of the same body within or outside of the Party. They operated on different levels of the Party structure, varying from a few national offices for two or three of the petitioners to relatively minor and separated local offices for several others.

The naming of the *Dennis* defendants as co-conspirators adds nothing but gloss to the case. The relatively minor positions in the Party of most petitioners, their geographical isolation from and infrequency of contact with the *Dennis* defendants, limited primarily to a few of the petitioners on a few occasions attending national conventions at which some of the *Dennis* defendants were present makes "it plain how little evidence there is in the record to convict them of a nation-wide conspiracy" *Keegan v. United States*, 325 U. S. 478, 492.

The indictment charges the petitioners, as part of the conspiracy, with "concentrating on recruiting persons employed in key basic industries and plants" [Clk. R. 1-3]. The record does indicate that some of the petitioners were concerned with the Party's policy of "concentration." But it reveals that this concern arose out of the fact that they believed that the Party should be primarily a workers' organization and that, for this reason, recruiting

should be concentrated at the places where workers were to be found, and particlularly where they worked in the largest numbers and possessed the greatest influence. There is no evidence that any petitioner supported the "concentration" policy for the purpose of gaining adherents for the proscribed advocacy. Their "concentration" is no more heinous than the concentration of a business men's organization on membership of business men, and particularly on those in the largest and most important industries.

The indictment also alleges that petitioners would "carry into effect detailed plans for the vital parts of the Communist Party to go underground in the event of emergency and from said underground position continue in all respects the conspiracy" [Clk. R. 1, 3]. The evidence in this record indicates that the term "underground" as used by the respondent's witnesses, testifying concerning it, referred to conduct of Party affairs in secrecy in order to avoid illegal harassment and persecution, to permit the carrying on of the legal activities of the Party and to seek to maintain it as a legal organization. The record is barren of evidence showing that the secrecy was designed as a cover for illegal advocacy or as a means of preparation therefor. This understandable endeavor of an organization to use legal means to protect itself (for there is nothing *per se* illegal in secrecy) cannot rationally be twisted into proof of wrongdoing.

Respondent relied in the courts below on the Party doctrine of "democratic centralism" as establishing that petitioners were part of a tightly knit organization arbitrarily controlled by its top leadership and accepting and unquestioningly carrying out its orders. Even if the

record showed this to be the case, which it did not, nothing unlawful is established thereby. An organization having the undemocratic characteristics which respondent attributes to the Communist Party may be socially reprehensible but it is not criminal. Only when the organization regardless of its structure is used by individuals for illegal purposes may penal sanctions be invoked. It is precisely such use of the organization which the evidence fails to establish against any petitioner.

In addition the record in this case negates respondent's contention as to the meaning of this doctrine, and, what is more important, as to its application in practice. In this case there is no evidence intimating that democratic centralism had a different meaning for petitioners than that given it in the Party Constitution. That document gives every member "not only the right but the responsibility to participate in the making of its policies and in the election of its leading committees, officers and delegates." After decisions are arrived at by "a majority vote" they are binding on all members, subject to the right of appeal to higher bodies. All members "have the right and duty to examine the execution of policies." Provision is made for recall of officers and for expulsion of members only following charges and a trial [Art. IV, Ex. 153, R. 208].

The prevalence of disagreement and debate within the Party appears throughout the record (See p. 83, n. 56, *supra*). It appears from respondent's witnesses that when they disagreed with the Party policies they were free to criticize and when their differences reached a breaking point they were free to terminate their membership.

It seems inconceivable that a comparable showing with respect to a trade union, a fraternal organization or a

church would afford a tenable basis for pinning a label of criminality upon it. But if the Communist Party and its members can be thus denounced, these other organizations will retain no invulnerability should their views chance to become extremely unpopular.

The sufficiency of the evidence of a conspiracy as charged depends upon proof of an agreement to engage in advocacy as charged. The deficiency in this essential proof cannot be overcome constitutionally by evidence that the Communist Party embraces the organizational principles of "democratic centralism."

The respondent's theory on the one hand disavows that its objective is to outlaw the Communist Party by treating it as a conspiracy. On the other hand it provides the basis for the conviction of any person in the United States solely upon evidence of active membership in the Party. In a conspiracy case, it is the agreement which is the common tie between defendants making each conspirator responsible for the conduct of the others. To sustain a finding of conspiracy where the only tie between the defendants is common membership or officership in the Communist Party is to employ the concept that the Party is the conspiracy. The following language from the decision of the Federal Trade Commission in *National Paper Trade Ass'n* (3 C.C.H. Trade Reg. R. Par. 25, 194, Sept. 25, 1954) rings out in protest against the indiscriminate coadunation of members of an organization on a conspiracy charge.

> "When the Government attempts to parley a conspiracy suit valid against a hundred defendants into a cease and desist order against a thousand for no reason other than that they all belong to trade

associations, it's time we took one look at the charge, two at the evidence, and three long looks at the procedures which defile so many on so little.

"The procedure involves the combination of a conspiracy charge and a class suit with a finding of guilt by association."

Cf. Lawson v. Hewell, 118 Cal. 613, 620, 50 Pac. 763 (1897).

Petitioners were not required to forego lawful activity as Communists because it is supposed that others might use the fruits thereof for unlawful purposes. To hold petitioners criminally responsible for their activities it must be shown by their conduct that they were parties to an understanding having the unlawful objectives. *United States v. Falcone,* 109 F. 2d 579, 581 (C. A. 2, 1940). The purpose of respondent in naming the *Dennis* defendants as "co-conspirators" appears to have been to taint the lawful activities of petitioners as Communists by an osmotic transfer of the finding of conspiracy which led to the *Dennis* convictions. The use of this device "is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders" (Judge Learned Hand, op. cit.).[82]

This Court has held that members of an association "are not subject to either criminal or civil liability" for the conduct of the officers or of the association "unless it is shown that they personally authorized or participated

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[82]Petitioners do not intend by the foregoing or by anything else in this Petition to concede that *Dennis* was correctly decided. It is hoped that the Court will reconsider that decision. However, even within the framework of *Dennis,* this case was wrongly decided.

in the particular acts." *United States v. White*, 322 U. S. 694, 702. A different principle would render membership in an association so fraught with danger to the individual as to denude the freedom of association guaranteed by the First Amendment. That right of association must be preserved for all, including Communists, if it is to afford a haven for dissent by any minority.

E. The Evidence Does Not Establish the Requisite Specific Intent of Any Petitioner.

Individual specific intent is a separate and essential element of the offense and like all other such elements must be proved by the prosecution beyond a reasonable doubt. *Hartzel v. United States*, 322 U. S. at 687; *Herndon v. Lowry*, 301 U. S. at 260. In discussing the insufficiency of the evidence to establish connection with the conspiracy, the inadequacy of the evidence on intent has largely been covered. However, there are certain additional observations pertinent to this issue.

In this case in addition to proof of intent "deliberately and with a specific purpose" to engage in the unlawful advocacy and to combine with others to that end (*Hartzel v. United States*, 322 U. S. 680, 686-7), "the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence" *Dennis*, 341 U. S. at 499; *Cf. Screws v. United States*, 325 U. S. 91, 101; *Musser v. Utah*, 333 U. S. 95, 97; *Winters v. New York*, 333 U. S. 507, 519-20; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 89-93; *Champlin Ref. Co. v. Corporation Commission*, 286 U. S. 210, 242; *Smith v. Cahoon*, 283 U. S. 553, 564. The importance of clear and convincing proof on this "essential element"

was underscored by this Court's declaration that any doubt with respect thereto presented constitutional issues demanding that the record be reviewed with scrupulous care (op cit. at 516).

Intent being a state of mind imposes a highly individualized burden of proof sustainable only by evidence of each individual's own conduct and words, including of course his knowing assent, evidenced by conduct or words, to the conduct or words of others. The record must reveal "the actual condition of the defendant's consciousness." Holmes, The Common Law, 56; see also Mr. Justice Holmes' dissent in *Abrams v. United States*, 250 U. S. 616, 626, referred to with approval in *Dennis*, 341 U. S. at 515. Obviously what lies in a person's consciousness cannot be gleaned from events outside his knowledge or comprehension. The declarations and conduct of an organization or of its members not brought directly home to the accused are not probative of his intent. *United States v. White*, 322 U. S. 694, 702-3; *Superior Engraving Co. v. National Labor Relations Board*, 183 F. 2d 783, 795 (C. A. 7, 1950); *United States v. Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 971 (D.C. S.D. Cal., 1942).

In a strict sense the ascertainment of the thoughts lying in the mind of man can never be directly ascertained. No X-ray equipment has been invented which enables us to view knowledge or ideas. Nor can they be tasted, smelled or touched. The most immediate approach to perception of what an individual knows or thinks is through the examination of his words whether written or oral. But words are insecure guides at best. This is so even where the words appear to be clear and unequivocal and susceptible of only one reasonable interpretation. Prob-

lems of semantics, context and circumstances constantly arise. And often we find the circle completing itself because what is meant by words may depend upon the intent with which they are uttered. Still and all what a man says is the most direct kind of evidence available of what he thinks.

Absent this most direct evidence the discovery of what an individual thinks may most clearly be ascertained by examining what he does in the light of what he knows. What he does illuminates his understanding and state of mind with respect to what he knows. Such evidence while not the most direct is perhaps the most reliable evidence of state of mind. For conduct is directly perceivable and is generally more certain in its characteristics than words. It offers the most dependable crucible for the distillation of intent from the expression of knowledge or ideas.

In the domain of the intellect suppression flouts democratic processes. Nevertheless the law, as it now stands, deems certain concepts so reprehensible that they may be punished when action with respect to them is contemplated even though it is not imminent.[83] Such a doctrine is that of the overthrow of our Government by force and violence. Acknowledging that free speech is threatened by the suppression of even such speech, courts have sought to minimize the danger by the requirement of strict standards of proof. Unless language is so direct, unequivocal and consistent that only one construction is reasonable, a reprehensible construction thereof will not be imputed to an individual, absent evidence of overt acts establishing that

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[83]This itself of course renders speech less than completely free.

such was his interpretation. *Schneiderman v. United States*, 320 U. S. at 158-9.

As has been noted above, knowledge affords the context in which the overt acts must be evaluated. Knowledge itself being a state of mind cannot be known through any of the five senses. Therefore the courts must rely upon evidence of the matters to which his mind has been exposed. When a complex body of thought is the subject matter of the knowledge a host of uncertainties confronts the trier of the fact. For what an individual knows are the precepts of which he is aware filtered through his own understanding derived from the sum total of his prior experiences. With these problems in mind, reviewing Courts' frequent refusals to accept findings of knowledge and intent based upon evidence which leaves the issue open to doubt can be given their full significance. *United States v. Falcone*, 311 U. S. 205; *United States v. Gardner*, 171 F. 2d 753, 756 (C. A. 7, 1948); *Kuhn v. United States*, 26 F. 2d 463 (C. A. 9, 1928); *Weniger v. United States*, 47 F. 2d 692 (C. A. 9, 1931); *Mazurosky v. United States*, 100 F. 2d 958 (C. A. 9, 1939); *Goodman v. United States*, 128 F. 2d 854 (C. A. 9, 1942); *Caldwell v. United States*, 139 F. 2d 121 (C. A. 5, 1943); *United States v. Haim*, 114 F. 2d 566 (C. A. 2, 1940); *Muyres v. United States*, 89 F. 2d 784 (C. A. 9, 1937); *Tingle v. United States*, 38 F. 2d 573 (C. A. 8, 1930); *Fulbright v. United States*, 91 F. 2d 210 (C. A. 8, 1937); *Lee v. United States*, 106 F. 2d 906 (C. A. 9, 1939); *United States v. Penn*, 131 F. 2d 1021 (C. A. 2, 1942). See also, *United States v. Di Re*, 332 U. S. 581, 593; *Keegan v. United States*, 325 U. S. 478, 488-95.

These it would seem are some of the considerations which have led this Court to hold that on issues of intent,

particularly where the intent is related to a body of opinion "regarding the whole nature of our Government," "proof is treacherous and objective judgment, even by the most disciplined minds, precarious" *Baumgartner v. United States*, 322 U. S. at 671, 675. Because a major dividing line between constitutionality and unconstitutionality in the application of the Smith Act is proof of the evil intent, the very liberties of the people depend upon the quality of the evidence deemed sufficient to uphold a finding thereof. The safeguarding of these precious interests demands that anything less than proof so certain that it leaves no troubling doubts be rejected as insufficient proof of intent.

To predicate a finding of intent upon the ultimate of a long sequence of inferences, particularly where each of them rests on hazardous deductions, makes of the constitutional requirement of proof of intent a cloak for, instead of a safeguard against, the destruction of constitutional rights. It is the former function which has been performed here. The evidence bearing upon each petitioner's intent, except for one incident involving the petitioner Stack,[84] and admitted in evidence solely as to her

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[84]In 1934 petitioner Stack, according to the witness Patterson, said she had training in the use of violence while attending the Lenin School in Moscow (see pp. 86-88, *supra*). The slight value, if any, of this testimony because of its remoteness rendered its admissibility extremely doubtful. *Boyd v. United States*, 142 U. S. 450; *Hall v. United States*, 235 Fed. 869, 871 (C. A. 9, 1916]; *Kammann v. United States*, 259 Fed. 192, 194-5 (C. A. 7, 1919); *Crowley v. United States*, 8 F. 2d 118, 119 (C. A. 9, 1925); *Flood v. United States*, 36 F. 2d 444, 446 (C. A. 9, 1930); *Boyer v. United States*, 132 F. 2d 12, 13 (C.A. D.C., 1942); *Cf. United States v. Rossi*, 182 F. 2d 292, 293, (C. A. 2, 1950); *Wolcher v. United States*, 200 F. 2d 493, 497, 499-500 (C. A. 9, 1952.) Moreover this incident occurred six years before the enactment of the Smith Act and it therefore cannot establish an intent to engage in advocacy which only became unlawful upon

intent, has been considered above in the general discussion of petitioners' connection with the conspiracy. The respects in which the evidence is insufficient to establish participation in an agreement to advocate violent revolution are applicable with even greater force to the evidence as it relates to an intent to achieve a violent revolution. The weakness and lack of solidity of this evidence are multiplied when an attempt is made to burden it with the inference of specific intent to actually accomplish the overthrow of our Government by violence.

It is inconceivable that these petitioners could have intended the violent overthrow of the Government of the United States and never once during the many years they were under observation have said so. The complete absence of evidence that any petitioner announced an intention to call for the violent overthrow of our Government is a fatal defect in the respondent's proof. *Cf. Hartzel v. United States,* 322 U. S. 680, 687. The Communist Party, according to respondent's theory, was the vehicle to be used at the appropriate time to carry out the object of the conspiracy charged; the members of the Party were to be imbued with that object so that they would be prepared to advocate and incite to violence when

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the enactment of that law. *Wolf v. United States,* 259 Fed. 388, 393 (C. A. 8, 1919); *Langer v. United States,* 76 F. 2d 817, 827 (C. A. 8, 1935). The witness neither recorded the oral conversation at any time nor discussed it with any one for a period of 16 years. His reliance on his unaided and biased recollection further decreases the probative value of the testimony. The conversation as reported by him is inconsistent with the absence of any evidence relating to petitioner Stack for the next 11 years. For it apparently contemplated imminent action of some kind in furtherance of the teachings. The lack of evidence of action of any kind, even though the witness Patterson for the next several years had an opportunity to observe the petitioner, completely eliminates any value of the evidence in establishing intent.

the conspirators thought the time ripe. With such indoctrination as an objective, it is odd indeed that the purpose was not declared by the alleged conspirators at the clubs, schools and meetings of the Party, the "conspiratorial" forums supposedly established for such indoctrination, at which petitioners were under observation day after day and year after year by F.B.I. agents and by bona fide members who later turned against their former friends and testified for respondent.

Petitioners were shown to have been connected with the Communist movement for a minimum of seven to a maximum of eighteen years, a collective total of 160, and an average of more than fourteen years. Even as to petitioner Kusnitz, whose earliest established connection with the Communist Party was only seven years before the indictment was returned (less than for any other petitioner), the failure to establish that she ever said or wrote anything even intimating, let alone declaring, an intent to accomplish the violent overthrow of our Government constitutes a gap in the proof which demands a reversal as to her.[85] When it is considered that in the total cumulative 160 years of activity in the Communist Party by the eleven petitioners there is not a single state-

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[85]The strength of respondent's case against this petitioner is indicated by the fact that it found it necessary to bring a witness from New York solely for the purpose of testifying that at a Party meeting in 1943, petitioner Kusnitz called for greater activity by women because so many men were in the armed forces (p. 70, *supra*).

ment, written or oral, attributed to any one of them stating an intention to accomplish the forceful overthrow of this Government, the hollowness of respondent's case where solidity of proof is essential becomes glaringly apparent. The evidence in this case is far weaker than that held insufficient to establish intent in numerous other cases. *Cf. Baumgartner v. United States,* 322 U. S. 665; *Hartzel v. United States,* 322 U. S. 680; *Keegan v. United States,* 325 U. S. 478; *Hall v. United States,* 256 Fed. 748 (C. A. 4, 1919); *Wolf v. United States,* 259 Fed. 388 (C. A. 8, 1919); *Orth v. United States,* 142 F. 2d 969 (C. A. 4, 1944); *Bergmann v. United States,* 144 F. 2d 34 (C. A. 9, 1944); *Bechtel v. United States,* 176 F. 2d 741 (C. A. 9, 1949); *Lehmann v. Acheson,* 206 F. 2d 592 (C. A. 3, 1953); *United States v. Hauck,* 155 F. 2d 141 (C. A. 2, 1946); *Meyer v. United States,* 141 F. 2d 825 (C. A. 5, 1944); *Annett v. United States,* 205 F. 2d 689 (C. A. 10, 1953). See also, *Ward v. United States,* 344 U. S. 924, *per curiam* decision, reversing 195 F. 2d 441 (C. A. 5, 1952). If the same measure of proof is applied in this case, each petitioner is entitled to a reversal because of lack of evidence of specific intent.

F. The Evidence Does Not Establish the Power of Any Petitioner Individually or as a Member of Any Group to Bring About the Evil at Which the Statute Is Aimed.

In *Dennis,* the Supreme Court said, "Where there is doubt as to . . . . the defendants . . . power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (341 U. S. at 516). The evil at which the statute is aimed is "armed rebellion" or an "attempt to overthrow the Government by force" (341 U. S. 509).

The petitioners in the *Dennis* case comprised a homogeneous group, the National Committee of the Party, and as such wielded the top executive authority in the Party and, between biennial conventions, its supreme policy-making powers. In *Dennis* the facts allegedly established the formation by the petitioners in that case of a "highly organized conspiracy, with rigidly disciplined members subject to call [to attempt an armed rebellion] when *the leaders, these petitioners,* [in the *Dennis* case] felt that the time had come for action . . ." (341 U. S. at 510-11, emphasis added). Thus it was found that the petitioners in that case could when they believed it desirable bring about an attempt at armed rebellion; this was the requisite "power to bring about the evil."

The record in this case is barren of any proof that the petitioners individually or collectively or together with others possessed any such power.

The petitioners here held Party positions that were widely disparate in title, function and authority. So far

as the record shows they never met together as a group and were not jointly vested with any authority. No one of them occupied a position whereby individually or as one of a group of persons he possessed powers remotely comparable to those which the *Dennis* petitioners wielded according to the findings in that case. Entirely aside from the lack of evidence in other respects, the record is devoid of evidence from which it might even be inferred that any petitioner had a voice in determining whether or when a call for a violent revolution should be announced.

The First Amendment obstacle to the conviction cannot be bridged with such a breach in the proof. The right to speak does not depend upon a governmental seal of approval; it may not be denied absent some proximity to unlawful action, which though it may vary in degree, dependent upon the nature of the evil, must nevertheless exist. *Dennis,* 341 U. S. at 510-13. An intent to accomplish a violent revolution has no realistic relationship to action to that end unless the ability to trigger the attempt exists. An individual may have the intent to move mountains, but unless he commands the necessary machinery or manpower, the attempt can never be made. There being no evidence that petitioners individually or as members of a body within the Party possessed the effective authority to command an attempt at violent revolution, there is no proof of power to bring about the evil or a "clear and present danger" emanating from it.

Summation.

These petitioners were not convicted because the evidence established that they were parties to a conspiracy or that they either intended or had the power to initiate an attempt at violent overthrow of the Government. The technique of the respondent in trying the case virtually precluded, in times of great national and international emotion around the issue of Communism, any fair or reasonable consideration of these issues by the jury. By far the greater part of the trial was taken up with the introduction of Marxist-Leninist writings, upon a showing that they were read or studied or distributed within the Party, and with the reading therefrom of carefully selected inflammatory passages (relating to other countries, times and conditions) torn out of context, containing unfamiliar and therefore frightening words and phrases such as "dictatorship of the proletariat," "revolution," "class struggle," "dialectical," and "democratic centralism." The attempt to explain the possible interpretations of these passages in the light of the whole body of Marxist-Leninist theory could be successfully undertaken in a college course, given an unbiased instructor seeking knowledge rather than conformity. In a trial before a jury in the atmosphere existing at the time of this trial, conducted by a prosecution bent upon using the books in a manner designed to obtain a conviction, this was impossible. What happened in this case is that human beings were indicted and books were put on trial.

II.

The Evidence Is Insufficient to Establish That the "Overt Acts" Alleged and Proved Were in Furtherance of the Conspiracy Charged in the Indictment and to Effect the Objects Thereof.

A. This Court has never had occasion to construe the "overt acts" provision of the general conspiracy law (18 U. S. C., Section 371) as applied to Smith Act prosecutions (18 U. S. C., Section 2385).[86] Since a charge of conspiracy to advocate and teach the forcible overthrow of the Government involves an element of speech in both the agreement and the object of the agreement, the requirement of allegation and proof of an "overt" or "open" act in furtherance of the agreement and to effect the object thereof takes on important legal and historical significance.[87]

So far as is relevant here, the statute (18 U. S. C., Section 2385) punishes only those who advocate and teach the overthrow of the Government of the United States by force and violence and those who organize any assembly of persons who advocate or teach "the overthrow or destruction of any such government by force and violence." The statute does not purport to make it

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[86]The 1948 consolidation of the Criminal Code by the Congress differentiated between prosecutions for conspiracy to forcibly overthrow the Government (18 U. S. C., Sec. 2384) and Smith Act prosecutions. In the former case, allegation and proof of "overt acts" were not required. See Reviser's Notes, 18 U. S. C. Sec. 371.

[87]Blackstone, in discussing the reasons for the "overt act" evidentiary rule in treason cases, states: ". . . the principal reason undoubtedly is to secure the subject from being sacrificed to fictitious conspiracies which have been the engines of profligate and crafty politicians in all ages." Comm. (Jones ed., 1916), Book IV, Ch. 27, Sec. 403, p. 2596.

an offense to advocate or teach the ineptitude of governmental policies or officials; nor does the statute punish any person who organizes or helps to organize an assembly who so advocate and teach. The Smith Act does not make it an offense for the Communist Party or its members to advocate and teach, and it is not a crime under the Smith Act to organize or help to organize the Communist Party.[88]

Under the law (18 U. S. C., Section 371), the burden rested upon the prosecution to allege and prove at least one "overt act" which would show that the agreement alleged in the indictment had passed beyond the mental stage and was, "on foot." As the Statement of the Case indicates *(supra,* p. 105), the only two overt acts alleged and proved within the period of the statute of limitations were "overt acts" numbered "13" and "16." Despite the absence of evidence in support of the other "overt acts" alleged in the indictment, none of these other "acts" were withdrawn before submission of the case to the jury.[89]

The proof of the "overt acts" comes down to this: On two separate occasions, public meetings were held in Los Angeles sponsored by the Communist Party. The meetings were publicly attended by about 1500 to 1700 per-

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[88]"There is no necessary identity in law between Communist Party members" and "members of organizations advocating the overthrow of the government." Justice Reed in *Bridges v. United States,* 346 U. S. 209, 234.

[89]Under the general verdict, it is not possible to now determine whether the conviction rested solely upon the alleged "overt acts" proven, or upon the "overt acts" alleged, but not proven. *Cf. Cramer v. United States,* 325 U. S. 1, 36, n. 45; *Haupt v. United States,* 330 U. S. 631, 641, n. 1; *Stromberg v. California,* 283 U. S. 359, 368; *Williams v. North Carolina,* 317 U. S. 287, 292. For this reason alone, a judgment of reversal is required.

sons on each occasion. There is no evidence of what was said or done at these meetings except that it was stated that they were Lenin Memorial meetings. A newspaper reported that the first meeting would serve primarily as a protest against "the current trial in New York of 12 national leaders of the party"; and the same newspaper reported that at the second meeting one of the petitioners spoke on the "key issue" of China, and demanded to know the position of certain named Congressmen on trade with and recognition of China. It should be noted that the prosecution witness who testified to attendance at these public meetings added nothing more than the fact that he had seen one of the petitioners chair a meeting and heard two others speak, but there was no testimony as to the content of the speeches. No evidence was adduced that the meetings were other than peaceable; there was no evidence that any violent or seditious language was used; there was no evidence that any literature or writing of any kind was distributed at these meetings; there was no evidence of any solicitation of persons to join the Communist Party. Indeed, there is not the slightest evidence in the entire record which in any way relates these two meetings with any other proof in the case.

The question thus presented is whether the evidence of such "acts" was substantial enough to establish that the alleged conspiracy was "in execution" and to justify the submission of the case to the jury for their finding of guilt beyond a reasonable doubt. It is of course settled that without proof of an overt act, a "charge of conspiracy cannot be submitted to the jury." *Braverman v. United States*, 317 U. S. 49, 53.

B. The maxim that "the will is taken for the deed," that a guilty intention alone is punishable, was never seriously accepted in English law. Radin, M., *Intent, Criminal* in VIII Cyc. Soc. Sci. 127. "They [the rules of law] whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external conduct." Kenny, *Outlines of Criminal Law* (15th ed., Camb. 1936), p. 40. "'So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing.'" Coke, Inst. III, p. 5. "'The thought of man shall not be tried, for the devil himself knoweth not the thought of man':—thus at the end of the middle ages spoke Brian C. J. in words that might well be the motto for the early history of criminal law." Pollock and Maitland, *History of English Law* (2nd ed., 1909), II, p. 474.

In early English history, the aforesaid principle was always observed in the letter, but rarely in the spirit. The "violently artificial" interpretations of the treason statute of Edward III, which made even the gathering of a peaceable assembly for obtaining parliamentary reform an "overt act" compassing the death of the King (May, *Constitutional History of England* (1880), II, p. 157), were intended to assure the stability of the reign, but they only facilitated acquittals in treason prosecutions because of "the popular dislike to strained interpretations of the law." Kenny, *supra*, p. 316. Even under the famous Treason Statute (25 Ed. III), however, the bare confederacy or conspiracy to kill the King was not treason; "but if the conspirators do provide any weapon, or other thing, to accomplish their devilish intent, this

and the like is an overt act to make it treason." Coke, Inst, III, p. 38. Yet, subsequent judicial interpretation extended the meaning of the treason clause to include "anything whatever which under any circumstances may possibly have a tendency, however remote, to expose the king to personal danger or to the forcible deprivation of any part of the authority incidental to his office." Ploscowe, M., *Treason* in XV Cyc. Soc. Sci., p. 95. Virtually any volitional act—utterances, writings or ordinary breaches of the peace—were construed as "overt acts" tending to undermine the "King's government." Kenny, *supra*, p. 315.

It is small wonder that the treason provision in the Constitution is so narrowly drawn. "The framers of the Constitution of the United States were aware of the fact that constructive treasons had been employed to exterminate political offenders in England. In order to prevent such abuses the framers inserted in the Constitution a very restrictive definition of treason." Ploscowe, *supra*, p. 95. As Justice Jackson stated in *Cramer v. United States*, 325 U. S. 1, 28: "The concern uppermost in the framers' minds, that mere mental attitudes or expressions should not be treason, influenced both definition of the crime and procedure for its trial."

If we consider the historical abuses against which the framers of the Constitution inserted the restrictive treason provisions, it would appear clear that the procedural safeguards there provided to guard against "constructive treasons" should serve at least as a frame of reference for prosecutions against conspiracies to incite to the forcible overthrow of the Government. The key to the protection of the individual in the treason clause lay in the requirement of an "overt deed" clearly and unequivocally

manifesting, without dubious inference, a specific intention to commit the offense. *Cramer v. United States*, 325 U. S. 1.[90] It should be recalled that alleged attempts at forcible overthrow of the Government were brought by the common-law judges within the compass of the treason statutes. In the trial of Lord Essex, the judges stated that "in every Rebellion the law intendeth as a consequent the compassing the death and deprivation of the King." 2 St. Tr. (1600) 1333, 1335 quoted in Ploscowe, *supra*, p. 95. Lord Gordon was indicted for high treason for allegedly inciting a tumultuous assembly to intimidate the Parliament and compel the repeal of certain Toleration Acts. The charge was that the accused had committed treason by "levying war against the King in his realm." In obtaining the defendant's acquittal, Thomas Erskine successfully argued that the "act" of presiding at a peaceable assembly could not be converted into an "overt act" of levying war. The treason statute, he argued, was confined "to acts which immediately,—openly,—and unambiguously, strike at the very root and being of government." There must be "premeditated, open acts of violence, hostility, and force;—nothing equivocal;—nothing ambiguous;—no intimidations, or overawings, which signify nothing precise or certain." 21 St. Tr. 590.

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[90]Madison stated:

> "But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author." *Federalist*, No. XLIII.

Thus, the crucial issue in all treason cases and cases involving alleged attempts at forcible overthrow of the Government became the question of the proof of the "overt deed." There appears to be no doubt that the founders, by the adoption of the Constitution and the Bill of Rights, were determined that there should be no convictions for treason or offenses akin to treason, upon proof only of the exercise of wholly innocent acts of speech, press or assembly. Chafee, *Free Speech in the United States* (1941), pp. 172-73, 186, 396; Hurst, *Treason in the United States* in 58 Harv. L. Rev., 395, 417-44 (1945).[91] See also, Brandeis J. in *Schaefer v. United States*, 251 U. S. 466, 493.

C. The aforesaid discussion is not intended to raise in this proceeding the power of Congress to create new offenses which at one time in history were covered by the charge of treason, nor to urge that the "two-witness" rule be made applicable to such cognate offenses. What

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[91]Willard Hurst, in his article in the Harvard Law Review, presents a host of historical materials to support the view that the treason clause was intended to be a broad limitation on governmental power in the area of speech. He states: "Indeed, it would be hard to believe that Madison, the author of the First Amendment and of the Report on the Virginia Resolutions in opposition to the Sedition Act of 1798, would have agreed that the expression of ideas might be criminally punished, if only the label were shifted from 'treason' ('compassing the death of the King') to some other tag." *Id.*, p. 431. The author states that "historical evidence . . . strongly suggests that the treason clause was in fact understood to guarantee nonviolent political controversy against suppression under the charge of treason or any other criminal charge based on its supposed subversive character." *Id.*, p. 442. The author further stresses that in its historic context, the "overt act" as a distinct element of treason amounts, "so far as the expression of ideas or beliefs is involved," to the requirement in any prosecution of substantial proof that the act would bring about the substantive evil sought to be prevented. *Id.*, p. 444.

is urged here is, in the light of history both in England and the United States, that the standard of proof of the "overt act" under the general conspiracy law when applied in prosecutions for inciting to the forcible overthrow of the Government is more closely akin to the exacting proof of the "act" in treason prosecutions than in ordinary criminal prosecutions where problems of speech, press and assembly are not met. The policy of the criminal law—"every crime must include an act"—is generally intended to prevent oppression by officials and to lessen the opportunities for perjury, frame-up and other arbitrary reprisals by those who wield power against individuals in disfavor. Where, however, prosecutions may result in serious curtailment of freedoms protected by the First Amendment, it is not only the accused who is interested in substantial proof of the "overt act"; all of society as history shows has a stake in the result.

The courts below, faced with the question of interpreting for the first time the applicability of the "overt act" provision of the conspiracy law to Smith Act prosecutions, swept aside all contentions that the requirement of an "overt act" placed a heavy burden of proof upon the prosecution in the proceedings herein; in the view of the courts below, the function of the overt act in conspiracy prosecutions for violation of the Smith Act is almost zero.

The trial judge gave the standard instruction common in all conspiracy prosecutions (Inst. 11-H, R. 13,747, App. Item 2(e), pp. 24-5), adding that the act "may be as innocent as the act of a man walking across the street, or driving an automobile, or using a telephone" (*Id.*, p. 24). The court declined to instruct the jury "that if the

evidence is as consistent with the hypothesis that the 'overt act' is merely the exercise of speech, press and assembly as with the intention to advocate and teach or accomplish the overthrow of the Government of the United States by force and violence as speedily as circumstances would permit, then the 'overt act' cannot be said to have been proven to be in furtherance of the alleged conspiracy beyond a reasonable doubt." The trial court also refused to instruct the jury that proof of mere participation in the lawful activities of the Communist Party could not be proof of an "overt act"; that if the proof of the "overt acts" failed to show beyond a reasonable doubt more than the exercise by petitioners of lawful discussion by speech and press, then the prosecution had failed to prove that the "overt acts" were in furtherance of the conspiracy alleged in the indictment; that if all the "overt acts" relied on by the prosecution were as consistent with petitioners' theory of the case as with that of the prosecution, it would be the duty of the jury to acquit (Prop. Insts. 39, 40, 42, 43, 44, App. Item 2(e), pp. 24, 26-9).

Thus, as can be seen, all First Amendment and historical considerations were excluded in the trial court's view of the "overt act" provision in Smith Act prosecutions. In affirming the judgments of conviction, the Court of Appeals approved the rulings of the trial court on this issue. The Court of Appeals reasoned as follows: (1) The indictment may have pleaded "innocuous" acts, but the indictment stated that they were done "in pursuance of the unlawful agreement," and that was enough [Clk. R. 115); (2) Since the jury was instructed in the same language as the pleading, that was enough [Clk. R. 122-3]; (3) In any event, the jury could

have inferred that the Lenin Memorial meeting was an "overt act" [Clk. R. 122], apparently under the general theory that "if conspirators to commit a crime of violence are charged with the use of speech or of writings or of meetings in order to obtain confederates, nothing further would be required than here contained" [Clk. R. 117].

The end result reached by the courts below disregarded not only history, but the ordinary principles of criminal law and the evidence in the record as well. The decision on the sufficiency of the "overt acts" was built upon abstract propositions of law and fact, wholly unrelated to the case herein. While undoubtedly the convictions here cannot be supported unless the standards of proof required by constitutional law and history are met, petitioners propose to show in the ensuing discussion that even if the case herein be treated as "just a conspiracy case," still even the standards of the ordinary criminal law have not been satisfied.

D. In the first place, it has never been the law that the mere giving of an instruction to the jury on an issue of fact is a substitute for evidence in support of that fact. If such were the law, a prosecutor could support a judgment of conviction without evidence, simply because the jury was instructed not to return a verdict unless there was proof beyond a reasonable doubt. ". . . a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred." *Parks v. Ross*, 11 How. (U. S.) 361, 372. There is a plethora of citations to support this rule. In *United States v. Ault*, 263 Fed,

800 (D. C. Wash., 1920), where an indictment charging conspiracy to violate provisions of the Espionage Act of 1918 was dismissed because of the insufficiency of the overt acts pleaded, Judge Neterer stated: "A court or a jury has no more right to draw inferences from facts that do not necessarily and legitimately authorize such inference than to find any other fact without evidence" (p. 804). The same court also stated: "There is no question, I think, if, after all of the evidence is presented, there is no testimony showing an overt act charged to have tended to effect the object of the conspiracy, the duty to direct a verdict of not guilty would be plain" (p. 803).

The two alleged "overt acts" were only peaceable assemblies; there was not a scintilla of evidence to establish that these meetings were to "obtain confederates." It has never been the law that any "act" of an alleged conspirator is an "overt act" in furtherance of a conspiracy. If such were the rule, it would be difficult for an alleged conspirator to draw a breath.

Less than a decade ago, this Court admonished that "the looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Krulewitch v. United States*, 336 U. S. 440, 449. The precise nature of the crime of conspiracy has remained extremely vague to a large degree because of its peculiar origins and elastic development. Arising out of an early attempt to punish those who instituted malicious prosecutions, this "mental crime" was broadened to punish all combinations to commit any offense or, indeed, any act which the common law judges deemed unlawful. Under the vague doctrine of criminal con-

spiracy the political, economic and social bias and unconscious prejudices of judges could easily be translated into one-sided decisions in fields of law where the "hydraulic pressures" of the day were adamant. The doctrine of criminal conspiracy as thus developed was subjected to serious abuse both in England and in this country where the doctrine became a part of early American law.[92]

In 1867, however, the federal conspiracy statute (Act, March 2, 1867, 39 Cong., 2d Sess., Ch. 169, 14 Stat. 484, Section 30) departed from the common law principles in two important respects: it limited conspiracy prosecutions only to those conspiracies whose object was a federal criminal offense, and it required the commission of some overt act other than the mere act of conspiring. The 1867 Act became Section 5440 of the Revised Statutes. Its clause requiring an overt act has received no substantial change since its first adoption. See, *United States v. Gradwell,* 243 U. S. 476, 481; *Gebardi v. United States,* 287 U. S. 112, 120, notes 3, 4.[93]

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[92]The English and American law and history are discussed in Bryan, J. W., *The Development of the English Law of Conspiracy* in 27 Johns Hopkins University Studies in Historical and Political Science (1909); Winfield, P. H., *The History of Conspiracy and Abuse of Legal Procedure* (Camb. 1921); Sayre, F. B., *Criminal Conspiracy* in 35 Harv. L. Rev. 393 (1922); Harno, A. J., *Intent in Criminal Conspiracy* in 89 U. of Pa. L. Rev. 624 (1941).

[93]The section as a whole, embodying the conspiracy clause, was accepted without explanation or debate. 39 Cong., 2d Sess., Sen. Feb. 28, 1867, 37 Cong. Globe 1920. Some states, like New York, had previously made changes in the common law rules. The revisers of the New York law stated: "By a metaphysical train of reasoning, which has never been adopted in any other case in the whole criminal law, the offence of conspiracy is made to consist in the intent; in an act of the mind; and to prevent the shock to common sense, which such a proposition would be sure to produce, the formation of this intent by the interchange of thoughts, is made itself an overt act, done in pursuance of that interchange or

This Court has, of course, held that an "innocent act" may be proven to be an act to effect the object of the conspiracy, and it has not adopted the proximate relation tests of criminal attempts to "overt acts" in conpiracy prosecutions; but it has never held that an innocent act, without other evidence, can be converted into an "overt act" or that the "overt act" need have no tendency as shown by the evidence to further the conspiracy or to effect its objects. Such latter principles would simply eliminate the "overt act" requirement of the statute.

In the early decisions of this Court interpreting the law, it was decided that the gist of the offense is conspiracy; that the object of the offense must be a federal crime, for the federal courts have no common law jurisdiction, and that the purpose of the requirement of "overt acts" was to afford a *locus poenitentiae* for the conspirators. *United States v. Britton*, 108 U. S. 199; *Pettibone v. United States*, 148 U. S. 197; *Bannon v. United States*, 156 U. S. 464. Referring to the "overt acts" requirement, this Court stated: "If such were not the law indictments for conspiracy would stand upon a different footing from any others, as it is a general principle that a party cannot be punished for an evil design, unless he has taken some steps toward carrying it out." *Bannon v.*

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agreement. . . . . ' Acts and deeds are the subject of human laws; not thoughts and intents, unless accompanied by acts." *Lambert v. People*, 9 Cowen 578, 625 (1827). There is an echo of the New York revisers in one of the early cases under the federal statute: "Acts and deeds are the subject of human laws, not mere thoughts and intents unless accompanied by acts. . . . ." *United States v. Goldberg*, 25 Fed. Cas. 1342, 1345 (No. 15,223) (C. C. E. D. Wisc., 1876). New York interprets its law as meaning that the overt act must be in furtherance of the conspiracy. "It is not sufficient if the overt act is only a part of and to form or cement the agreement." 18 Brooklyn L. Rev. 263 (1952).

United States, supra, p. 469. In *Hyde v. United States,* 225 U. S. 347, this Court emphasized the infirmities of the common law concept of conspiracy, calling it a "rigid abstraction" (p. 359). It was stated: "Such act [the overt act] is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy . . ." (p. 359). While holding that the "act" may be seemingly innocent, this Court stated "that the act must have the conspiracy in view and have some power to effect it" (p. 360). "As we have pointed out, the statute states what in addition to the agreement is necessary to complete the measure of the offense. *The guilty purpose must be put into a guilty act*" (p. 363, emphasis supplied). In *Joplin Mercantile Co. v. United States,* 236 U. S. 531, this Court reverted to the rule in *Britton* and held that the "overt acts" were something apart from the conspiracy, that conspiracy was the gist of the crime, but at the same time held that proof of the overt act was "essential to the completion of the crime" (p. 536). Finally, in *Braverman v. United States,* 317 U. S. 49, this Court stated that "it is unimportant, for present purposes, whether we regard the overt act as a part of the crime which the statute defines and makes punishable . . ., or as something apart from it, either as an indispensable mode of corroborating the existence of the conspiracy or a device for affording a locus poenitentiae" (p. 53). The salient principle is that without proof of the overt act, "a charge of conspiracy cannot be submitted to the jury" (p. 53).

Thus, even in the terms of ordinary criminal law, this Court has assigned an important function to the "overt act" in conspiracy prosecutions. The act must show the

"existence of the conspiracy"; it must show that the conspiracy is in "execution"; it must show that the general and specific criminal intents have erupted into an "open deed" from which there is no retreat and which for the first time calls for the application of the sanctions of the law; there must be "some power" in the act to effect the object of the conspiracy. The very statute calls for an "act to effect the object of the conspiracy (18 U. S. C., Section 371), which, taken literally, means to "complete, realize, carry out, consummate, compass, fulfill" (Webster's *New International Dictionary*), the object of the conspiracy. If this Court has never carried the construction of the law to those limits, it certainly has never held that the "overt act" is equivalent to any "act" which a jury may guess or conjecture is in "furtherance of the conspiracy."

Nor have the lower courts adopted a different interpretation. Thus, in *United States v. Ault*, 263 Fed. 800 (D. D. Wash., 1920), nineteen "overt acts" alleged in the indictment, consisting of vitriolic attacks upon governmental policies and officials, were held insufficient in relation to a conspiracy allegedly having as its object attacks upon "the form of the government or the Constitution of the United States." The court stated that such acts would "not be a step or link in the chain which would effect, achieve, or accomplish the criminal conclusion of the charge, and could not be considered as overt acts" (p. 803). In *Lonabaugh v. United States*, 179 Fed. 476 (C. A. 8, 1910), the court stated that it is not enough that the act is "directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction" (p. 481). In *DeLuca v. United States*, 299

Fed. 741, 745 (C. A. 2, 1924), the court stated: "However, the overt act must be one which tends to further the conspiracy. If not, it is not an overt act, no matter what it may be called. It is the character of the act which is the determining factor and classifies it. It is not the name which it may be called." In *United States v. McLaughlin*, 169 Fed. 302, 307 (D. C. Minn., 1908), the opinion read: "It [the overt act] may not be sufficient of itself to complete the offense, but it should have a tendency to do so." In *Tillinghast v. Richards*, 225 Fed. 226 (D. C. R. I., 1915), where the question was exhaustively discussed, the court stated: "While it is possible that what are alleged as overt acts might be such as to a conspiracy of a different character, they are not in train or in causal connection with the unlawful object of the conspiracy here alleged. . . . These are, for all that appears, nonculpable acts, from which no intent to defraud can be inferred. . . ." (pp. 229, 230). In *Dahly v. United States*, 50 F. 2d 37, 42 (C. A. 8, 1931), the court stated: "The overt act or acts need not be criminal *per se*; but an overt act must be one independent of the conspiracy or agreement . . . it must be a subsequent independent act following the complete agreement or conspiracy, and done to carry into effect the object of the conspiracy." In *United States v. Offutt*, 127 F. 2d 336, 340 (C. A. D. C., 1942), Judge Vinson stated: "Of course it is well settled that an overt act need not be a wrong. It is rather a manifestation that the conspiracy is at work. *But it must be that*" (emphasis supplied).

E. Tested by the aforesaid principles of ordinary criminal law, there was no evidence in the record which justified the submission to the jury of the two "overt

acts" upon which the prosecution relied below. There was simply no relation between the alleged conspiracy of these petitioners to advocate and teach the forcible overthrow of the Government and to use the Communist Party as a vehicle for such purpose and the two public and peaceable meetings sponsored by the Communist Party in Los Angeles. On their face, the meetings were so innocuous and so lawful that no serious contention can be made that they gave any indication that the conspiracy charged in the indictment was in execution or that the "acts" could by any possibility effect the objects of the alleged conspiracy. No possible inference of a conspiracy, of an intent to advocate and teach the forcible overthrow of the Government or an intent to accomplish such overthrow as speedily as circumstances permit, could be drawn from these two meetings. The short of the matter is that there was just no evidence to show that these two "overt acts" were "in furtherance" of the alleged conspiracy or to "effect the objects" thereof.

While it may appear unnecessary, therefore, to discuss the theory upon which the case was submitted to the jury, since without evidence the jury could not be justified in returning its verdict, it is important to discuss the matter because of its relation to the constitutional question here presented.

The theory of the prosecution, adopted by the courts below, in effect was this: An accused in a Smith Act conspiracy prosecution, when shown to have performed any act on behalf of the Communist Party, or to have participated in any of its activities, no matter how lawful, has committed an "overt act" in furtherance of a conspiracy to advocate and teach the forcible overthrow of

the Government and to use the Party for such purpose with the specific intent to accomplish that forcible overthrow as speedily as circumstances permit. The gloss placed on this theory below was the generality that the "jury is justified in drawing legitimate inferences from all the evidence."[94]

Not only does such theory lack legal validity; it represents the dangerous technique of permitting the jury to decide a Smith Act prosecution by conjecture, surmisal, suspicion and guesswork. Instead of limiting such prosecutions to proof of guilt beyond a reasonable doubt, it permits the jury, if such argument be accepted, to vote its prejudices. The major premise of this theory is that the entire Communist Party is a conspiracy, that any "act" in support of that Party or any participation in its activities is an "overt act" in furtherance of the "conspiracy." Attendance at public meetings sponsored by that Party, signing the most laudable petition initiated by that organization, joining the Party, paying dues—any connection—direct, indirect, or parallel—would be interdicted. Such "overt acts" might indeed serve to prove, by "reasonable inference," that the most innocent actor had become a member of an alleged conspiracy. Yet, the court

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[94]We do not repeat our prior discussion on the insufficiency of the evidence generally. There is no rule that permits inferences to be drawn where there is no evidence, direct or circumstantial, from which the inference can be drawn; nor do we again discuss the invalidity of piling inference upon inference from a baseless premise (*supra*, pp. 145-158). Professor Wigmore states:

> "But, in the process of inferring the existence of that inner consciousness from the outward conduct, there is ample room for erroneous inference; and it is in this respect chiefly that caution becomes desirable and that judicial rulings upon specific kinds of conduct become necessary." *Evidence* (3rd ed.), II, p. 106.

below conceded that the Communist Party was not the conspiracy charged in the indictment; the evidence was clear that the Party engages in lawful activities; and in theory of law this has never been denied. *Wieman v. Updegraff*, 344 U. S. 183. Apparently, it was the view below that the law was satisfied by these legal concessions, even if the jury were permitted to conjecture to the contrary.

Nor did the minor premises of the prosecution and the courts below have any added validity. It appeared to be the view below that no inference of wrongdoing could be drawn from mere membership in the Communist Party, but that the jury could legitimately draw such inferences from Party membership plus any other activity in connection with the Party, no matter how lawful. The line was drawn between passivity and movement. Such a line was not drawn by the Congress when it enacted 50 U. S. C., Section 783(f), (Act Sept. 23, 1950, c. 1024, Title I, Sec. 4, 64 Stat. 991). It is there provided that "neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation . . . of any other criminal statute." Certainly, if membership or officership in the Party is not *per se* a violation of any criminal statute, proof of lawful acts as a member or officer of the Party does not total up to a violation of any statute, or justify such inference.

Another minor premise advanced below ran somewhat as follows: Admitting that the assembly was lawful and peaceable, still one of the accused had spoken critically of governmental policies. The jury, despite the absence of any other evidence, could "infer" that this utterance

was an "overt act" in furtherance of the conspiracy because it was probably intended to create doubts in the minds of the listeners about the trustworthiness of governmental officials; that these doubts would probably be resolved by the conviction of the hearers that the form of government should be abolished; that this conviction in turn would probably lead to the conclusion that the present Government of the United States should be overthrown by force and violence, and as speedily as circumstances permit.

As we have noted, there was not a scintilla of other evidence in the record to justify any initial inference of conspiracy or criminal intent from the utterance, let alone the grotesque series of inferences which were strung together by the prosecution thereafter.[95]

Finally, it was conjectured below that the meetings which some of the petitioners attended were intended to help "organize the Party," or "strengthen" it, or "recruit confederates." Of course, there was no evidence of any recruiting or solicitation of any kind at the meetings, or any evidence that it was intended for such purpose. It was "reasoned," however, that some persons might like the Party after listening to the speeches; that they would apply for membership; that thereafter they would receive books on Marxism; that they would read these books and interpret them as the prosecutor did; that thereafter they would become convinced that the Government should be overthrown by force and violence; then seek out the "conspiracy," and join.

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[95] "An inference of criminality must rest on something more substantial than the imagination of a prosecuting attorney or a trier of the facts." *United States v. Gardner*, 171 F. 2d. 753, 756 (C. A. 7, 1948).

It should be noted that petitioners were not indicted for conspiring to organize or to strengthen the Communist Party, nor for conspiring to recruit members to that Party. The sole charge here was that these petitioners conspired to use the Party as a vehicle "to advocate and teach the overthrow of the Government of the United States by force and violence" [Inst. 13, R. 13,756, App. Item 2(g), p. 36]. The lawful assemblies involved herein gave no inkling that such a conspiracy was afoot and they could not logically have any tendency to effect the object of such alleged conspiracy. The guesswork in which the courts below permitted the jury to indulge was so patently wrongful, that the mere statement of these catenate inferences is enough to show the error committed.[96]

It will thus be seen, that only by disregarding the evidence and torturing the rules of logic to their extremity, can any argument be made that participation in the lawful assembly sponsored by the Communist Party in this record here was an "overt act" in furtherance of the conspiracy alleged in this indictment and to effect the objects thereof. No decision of any court in any criminal case, when the language of the decision is read with the recital of the facts therein, supports the ruling of the courts below. What in effect was done here was to disregard the plain requirements of the federal statute and to return to the doctrines of common law conspiracy.

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[96] ". . . to argue that, because a man is a Catholic, he must think it right to murder an heretical sovereign, and that, because he thinks it right, he will attempt it, and then to found on this conclusion a law for punishing him as if he had done it, is plain persecution." Macauley, *Critical and Miscellaneous Essays* (N. Y. 1879), vol. I, p. 195.

The broad consequences of such action is the burden of our final discussion on this question.[97]

F. (1). Judge Learned Hand once spoke of the conspiracy prosecution as "that darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F. 2d 259, 263 (C. A. 2, 1925). He warned later against the practice of prosecutors who "seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided." *United States v. Falcone*, 109 F. 2d 579, 581 (C. A. 2, 1940).

It has long been recognized that loose practice in the use of the conspiracy weapon constitutes "a serious threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U. S. 440, 446, n. 2. The crime is "predominantly mental in composition" (*Id.*, p. 448), an offense which has become so "elastic" in modern times and so dangerously extended in its concept and facilitation of proof (*Id.*, pp. 451-2) as to justify the concern of the entire legal profession and judiciary.[98] Particularly are there procedural advantages from using the conspiracy device which add to the danger of "unguarded extension

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[97]Wharton states:

"The only safe course is to make the test objective, even, and palpable, and to apply universally the limit here presented, holding that conspiracy does not lie unless the defendant can be proved to have done something which, if not interrupted by extraordinary occurrences, or by collateral human intervention, would have resulted in an unlawful act." *Criminal Law* (12th ed.), vol. II, Sec. 1605, p. 1864.

[98]See, Lasky, *The Long Bow or Lucretius, Book IV, Line 817*, in 43 Calif. L. Rev. 596 (1955), where the loose use of conspiracy prosecutions against economic organizations is subjected to critical examination.

of the concept" (*Id.*, pp. 452-53). "The hazard from loose application of rules of evidence is aggravated where the Government institutes mass trials" (*Id.*, pp. 453-4).

Our point here simply is that the incidence of a ruling by this Court on the kind of proof necessary to establish the "overt act" in prosecutions under 18 U. S. C., Section 371 will necessarily extend far beyond Smith Act prosecutions. There is no mystery about a conspiracy prosecution. Like all offenses, every ingredient of the crime should be proved by clear, convincing and unequivocal evidence. To undermine the "overt act" provision of the statute, to evolve a rule that "any act" is an "overt act," would not only be contrary to law, but it would increase in multifold fashion the dangers of oppression from prosecutors and the triers of the facts alike. If it is the policy of the law not to punish the mere *mens rea*, if it is the policy to punish only the "open deed," that policy would seem thwarted by a rule which makes it unnecessary to prove by substantial evidence that the "deed" was in furtherance of the conspiracy and to effect the object thereof.

(2) However, Smith Act prosecutions are something more than ordinary criminal prosecutions. This Court has noted that each of such prosecutions involves issues of speech, press and assembly. *Dennis v. United States*, 341 U. S. 494, 502.[99] It is, therefore, important that the general conspiracy law shall not be given a construction, as applied to Smith Act prosecutions, which will entrench on basic liberties.

At least before such a fundamental right as freedom of assembly is given the "dynamic quality of crime,"

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[99]See, Boudin, *"Seditious Doctrines"* and the *"Clear and Present Danger Rule"* in 38 Va. L. Rev. 143, 315 (1952).

there should be the clearest proof that a particular assembly, lawful in all respects, is an "overt act" in furtherance of a conspiracy. If this standard is not maintained, there is the evident danger that all may incur punishment who attend such a peaceable assembly, all may become "conspirators" or "abettors" or "accessories." The right of association will thus disappear, and the doctrine of guilt by association will become not only the weapon of the politician, but the law of the judicial forum. Against such inroad, the courts, it is respectfully submitted, should "set their faces like flints" *Bridges v. United States*, 184 F. 2d 881, 887 (C.A. 9, 1950). See also, O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L. Rev. 592 (1948); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 Harv. L. Rev. 276 (1948).

Of course, a combination of persons assembled together may by "open acts" indicate that their purpose is to further a conspiracy to commit serious crimes. But it is quite another thing when the law denotes a peaceable assembly, and every utterance therein, as an "overt act" in corroboration of some conspiracy merely because an alleged conspirator attended or spoke at the meeting in lawful and peaceable manner. Even in 18th Century England, unfettered by a written Constitution, no such rule was ever invoked. Stephen in his *History of the Criminal Law of England* notes that the application of the inchoate crime of conspiracy "to political and especially to seditious offences is comparatively modern" (1883), Vol. II, p. 377. He states: "Seditious language, however, has on several occasions been made the subject of prosecutions, the charge being that of unlawful assembly or seditious conspiracy, *of which violent speeches have*

been regarded as overt acts" (*Id.*, p. 377), (emphasis supplied). Stephen adds: ". . . but a mere meeting for the purpose of political discussion is not in itself illegal unless the circumstances under which it is convened or its behaviour when it is convened is *such as to produce a breach of the peace*, nor do I think that bare presence at such a meeting as a hearer or spectator makes a man guilty of any offence . . ." (*Id.*, p. 386), (emphasis supplied). Thus, in England, where only common law conspiracy was involved, the necessity of allegation and proof of some guilty "act" was a requirement to evidence the guilty intent.

We respectfully submit that the law in the United States, in the face of the express language of a Congressional statute and the mandate of the Constitution, should require no less an exacting standard in the proof of the "overt deed." This Court once stated: "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U. S. 542, 552. See also, *Hague v. C. I. O.*, 307 U. S. 496. That right, and all other rights cognate thereto, may well be lost if a peaceable assembly, without substantial proof, can be turned into an "overt act" in furtherance of an alleged conspiracy.

(3) Finally, and most importantly, without a standard of clear, convincing and unequivocal proof, insofar as the "overt act" in conspiracy prosecutions is concerned, the fundamental right to freedom of expression and discussion may well be lost. There are many courageous persons who can withstand the epithets flung at them in the marketplace of ideas; there are few who can stand

up to a threat of imprisonment. Yet without freedom of expression, without freedom to assemble and criticize, the most vital policies of government, affecting the life and death of its citizens, may go unchallenged. Writing of the attacks upon civil liberties during the first World War, a learned observer states: "Those who gave their lives for freedom would be the last to thank us for throwing aside so lightly the great tradition of our race. Not satisfied to have justice and almost all the people with our cause, we insisted on an artificial unanimity of opinion behind the war. Keen intellectual grasp of the President's aims by the nation at large was very difficult when the opponents of his idealism ranged unchecked while the men who urged greater idealism went to prison. In our efforts to silence those who advocated peace without victory we prevented at the very start that vigorous threshing out of fundamentals which might today have saved us from a victory without peace." (Chafee, *Freedom of Speech* (1920), p. 119). Unless this Court draws the line sharply between "acts" of speech, press and assembly, and "acts" of conspiracy, incitement and attempts, the balance betwen order and security on the one hand, and guaranteed personal liberties on the other, will not be maintained. Without such balance, as this Court has often stated, the nation cannot endure.

Justice Jackson stated in *Thomas v. Collins*, 323 U. S. 516, 547: "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such . . . . Speech of political malcontents is sought to be reached by associating it with some variety of 'sedition.' Whether in a particular case the association or characterization is a proven and valid one often is difficult to resolve. If this Court may not or

does not in proper cases inquire whether speech or publication is properly condemned by association, its claim to guardianship of free speech and press is but a hollow one." In *American Communications Association v. Douds*, 339 U. S. 382, 393, 399, Chief Justice Vinson stated: "Communists, we may assume, carry on legitimate political activities . . . The high place in which the right to speak, think, and asemble as you will was held by the Framers of the Bill of Rights and is held today by those who value liberty both as a means and an end indicates the solicitude with which we must view any assertion of personal freedoms. We must recognize, moreover, that regulation of 'conduct' has all too frequently been employed by public authority as a cloak to hide censorship of unpopular ideas."

On at least three different occasions this Court has rendered landmark decisions affecting the Communist Party and its members which emphasizes the aforesaid. We refer to *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; and *Schneiderman v. United States*, 320 U. S. 118.[100] In all of these cases, this Court made it clear that no criminality could be attached, nor dubious inferences drawn, from lawful speech, press or assembly, whether such speech, press or assembly emanated from the Communist Party and its members, or from any other group against whom official hostility was directed. Moreover, in each case this Court insisted that the fundamental reason for so holding was to preserve inviolate constitutional liberties against subtle encroachments.

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[100]The same rationale permeates such decisions as *Fiske v. Kansas*, 274 U. S. 380; *Hartzel v. United States*, 322 U. S. 680; *Taylor v. Mississippi*, 319 U. S. 583.

In each of these cases, the evidence of the "overt deeds" was far more replete than the two almost silent assemblies involved herein. See, *DeJonge v. Oregon, supra,* at pp. 358-60; *Herndon v. Lowry, supra,* at pp. 247-253; *Schneiderman v. United States,* 320 U. S. 118, at pp. 125-31. Yet, in each case, this Court refused, in the light of the Constitution, to attribute criminality to or infer criminality from the activities of the accused.

In *Herndon,* this Court stated:

> "We are of opinion that the requisite proof is lacking . . . The only objectives appellant is proved to have urged are those having to do with unemployment and emergency relief which are void of criminality. His membership in the Communist Party and his solicitation of a few members wholly fail to establish an attempt to incite others to insurrection . . . The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have forseen his words would have some effect on the future conduct of others" (pp. 259-61, 263-4).

This Court in *Herndon,* therefore, refused to draw unlawful inferences from the exercise of constitutionally protected freedoms, and declined to permit the jury to pile inference upon inference from such lawful activities to some baseless and biased conclusion.[101]

In the courts below, all of the aforesaid was dismissed with "this is a conspiracy case." But this Court has never accepted the "form" as a substitute for the "sub-

[101]The standard of proof in both criminal and civil proceedings, where liberties are at stake, has never lessened. *Baumgartner v. United States,* 322 U. S. 665; *Klapprott v. United States,* 335 U. S. 601; *Gonzales v. United States,* No. 111, October Term 1955, decided December 12, 1955; 24 L. W. 3164.

stance." In the respect herein, the "overt act" must be proved substantially whether the form of the charge is a substantive offense or a conspiracy to commit the offense. It was not the form of the proceeding which bottomed the decisions in *DeJonge, Herndon* and *Schneiderman* (they were both civil and criminal)—it was the fact that constitutional rights would be lost if, without substantial evidence to justify a contrary conclusion, the State or the trier of the facts could infer criminality or criminal intent from the lawful exercise of speech, press and assembly. Indeed, it would appear to be a more serious violation of right, when the State disregards an express Congressional mandate and asserts that a federal court may take jurisdiction of a conspiracy prosecution without alleging and proving a single overt act corroborating the existence of the alleged conspiracy, except a lawful and peaceable assembly. "The most odious of all oppressions are those which mask as justice." *Krulewitch v. United States,* 336 U. S. 440, 458.

Whatever may be the nature of the inchoate crime which the law seeks to punish—incitement, attempt or conspiracy—it is submitted that the constitutional mandate cannot be satisfied without "clear, unequivocal and convincing proof" of the "overt deed." It may be that one offense may be morally more repellant than another, but in any case no subjective aversion to one crime as against another can justify the abandonment of legal requirements of proof without which constitutional rights may be infringed, indeed washed away.

> ". . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"
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> *Boyd v. United States,* 116 U. S. 616, 635.

III.

The Exclusion of the Issue of Incitement to Action From the Case by the Courts Below Resulted in an Unconstitutional Construction and Application of the Smith Act.

The courts below construed the Smith Act as punishing all advocacy and teaching of the forcible overthrow of the Government when accompanied with a criminal intent. With respect to the idea of overthrow of the Government "by force and violence," the courts below appeared to draw no line between discussion, advocacy of general principles or incitement to action.[102] In the posture of the record below, it was held that any agreement by members of the Communist Party to advocate and teach the doctrines of Marxism-Leninism, equated with "force and violence," was interdicted by the Smith Act and conspiracy law.[103] It was unnecessary under the Smith Act, according to the courts below, for the contemplated teaching and advocacy to include any call to action. The issue of "incitement to action" was specific-

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[102]The editors of United States Law Week construe the opinion of the Court of Appeals as follows:

> "Smith Act indictment charging that defendants have conspired, with specific objective of causing forcible overthrow of Government, to organize group dedicated to advocacy and teaching of such overthrow adequately defines criminal conspiracy *even if planned advocacy and teachings are protected by First Amendment.*" 23 L. W. 2477 (March 29, 1955) (Emphasis supplied.)

[103]The courts below ruled that intent to overthrow the Government by force and violence "as speedily as circumstances permit" could be inferred from proof of such agreement. The "overt act" to effectuate such consipracy could be inferred from any participation in the activities of the Party, no matter how lawful. The agreement to so advocate and teach with intent to overthrow was the "clear danger"; the intent to overthrow as speedily as circumstances permit, the "present danger."

ally excluded from the case and from consideration by the jury at the trial.

The question presented is whether such construction and application of the Smith Act to these petitioners is in accordance with this Court's interpretation of the statute in *Dennis v. United States,* 341 U. S. 494, and the applicable provisions of the Constitution examined in the light of the legal and political history of the nation. The discussion which follows may be appropriately divided as follows: the treatment of the issue of "incitement to action" by the courts below in the case herein; the consideration of the same issue by the different courts in the *Dennis* case; the legal and historical roots of First Amendment rights to full and free discussion and advocacy, as contrasted with utterances which incite to unlawful actions; the instructions by the trial court to the jury herein after the exclusion by that court of the issue of "incitement to action"; the invalidity of the construction of the statute by the courts below in the light of constitutional law and history.

A. The Treatment of the Issue of "Incitement to Action" by the Courts Below.

(1) There is no room in the record for any dispute as to the plain purpose of the trial court to exclude the issue of incitement from the case. "That may have been important in the Dennis case," stated the District Court, "but I think that question is laid at rest by the Dennis case" [R. 9693]. When the question was raised again on the motions for judgments of acquittal, the District Court stated that Congress had "constitutionally proscribed" advocacy of violent overthrow of the Govern-

ment when it was accompanied by the requisite intent. "Whether it is of the degree that amounts to incitement, whether it is something else, might be one way of characterizing the evidence, but I don't think it would help here" [R. 9693].

Thus, it was immaterial to the trial court whether the proof failed to show any agreement to advocate in language of incitement to action. Petitioners requested the trial court to instruct the jury that a finding that petitioners had agreed to advocate in terms of a call or incitement to action was essential to a verdict of guilt.[104]

The United States at the same time requested the trial court to instruct the jury to the same effect in the precise language of the instruction given on this subject in *Dennis* (341 U. S. at 511-12).[105]

None of the aforesaid instructions was given. Thus, the failure to instruct did not rest upon the particular formulation in the proposed instructions. On the contrary, both the respondent and the petitioners were unsuccessful in any way in persuading the trial court to submit the issue of "incitement to action" to the jury; no formulation was acceptable to the trial judge because he

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[104] ". . . a person can be said to teach or advocate the overthrow and destruction of the Government of the United States by force and violence only when his expressions are designed to induce action, rather than discussion or belief, and only when they are expressed in language which, under the circumstances in which it is used, is reasonably and ordinarily calculated to incite persons to such action, rather than merely to discussion or belief"; that the burden was on the prosecution to establish that the common understanding of the alleged co-conspirators included an understanding that "advocacy would be in language amounting to incitement to action" (Prop. Inst. 29, 51, App. Item 2(q), pp. 74, 76).

[105] (See p. 112, n. 69, *infra*).

did not believe that the issue of incitement was a question of fact for the jury to decide.[106]

The trial court made its position plain. The court could not see in the record what the language of "incitement to action" was; such language "would mean anything at all" to the court; and the court didn't know "what it would mean to the jury." The crime was committed if the accused agreed to advocate and teach with the "proscribed intent," whether language of incitement was contemplated "or not."

(2) The Court of Appeals, while following a different road, reached the same result as that of the trial judge. The Court held that the trial judge had quite properly refused to give any instructions on the issue of "incitement to action"; it ruled that in *Dennis* such an instruction might have been essential but that here it was not because the amendment to the conspiracy provisions of the law adding the requirement of proof of an overt act had changed the character of a prosecution such as this

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[106] "The Court. *What is the language that is incitement to action? That means anything at all to me. I don't know what it would mean to the jury*" [R. 12,441]. (Emphasis supplied.)

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"The Court. I think there again you are talking about the quantum of proof, the type and character of evidence. As I understand it, and as I have said, a man can get out here on the front steps of the Federal Building and in the best of well modulated tones, almost timid, could make this speech to be reproduced on a recorder and played to the jury and the jury might find he advocated the overthrow of the government by force and violence, and he advocated it in certain language and in a certain tone of voice which you and I might consider mild, very mild. The jury might decide he did it with the intent to accomplish the overthrow of the Government of the United States by force and violence as speedily as circumstances permit" [R. 12,442-3].

from something other than a "true" conspiracy case to a "standard" conspiracy case.[107]

Thus, the Court of Appeals gave express approval to the rulings of the trial court. It held that the issue of "incitement to action" had been properly excluded from the jury's consideration [Clk. R. 129].

B. The Treatment of the Question of "Incitement to Action" in Dennis.

If, as the Court of Appeals held, there is a "deep gulf" between the *Dennis* case and the case herein, it lies precisely, in at least one respect, between the construction and application of the Smith Act by the respective courts on the question of incitement to action. Here the courts below drew no distinguishable line between discussion, advocacy and incitement; the courts in *Dennis, without exception,* fixed the line sharply, emphasizing that such construction was demanded by the Constitution.

Thus, Judge Medina in *Dennis* instructed the jury, first, that it must be satisfied beyond a reasonable doubt that the accused conspired to advocate and teach the forcible overthrow of the Government and to organize the Communist Party for such purpose. 9 F. R. D. 367, 376. Judge Medina then instructed the jury that they must also be satisfied beyond a reasonable doubt that each of the accused intended to forcibly overthrow the Government "as speedily as circumstances would permit

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[107]The Court of Appeals stated: "Under this indictment, *if it be assumed that advocacy and teaching are immunized by the constitutional guarantees,* still, *even though these means were lawful and protected,* since the advocacy was intended to cause the destruction and overthrow of the government by force, a criminal conspiracy was defined" [Clk. R. 114]. (Emphasis supplied.)

it to be achieved" 9 F. R. D. 367, 390. The Court then stated:

> *"In further construction and interpretation of the statute* I charge you that *it is not the abstract doctrine of overthrowing or destroying organized government by unlawful means which is denounced by this law, but the teaching and advocacy of action for the accomplishment of that purpose, by language reasonably and ordinarily calculated to incite persons to such action.* Accordingly, you cannot find the defendants or any of them guilty of the crime charged unless you are satisfied beyond a reasonable doubt that they conspired to organize a society, group and assembly of persons who teach and advocate the overthrow or destruction of the Government of the United States by force and violence, and to advocate and teach the duty and necessity of overthrowing or destroying the Government of the United States by force and violence, *with the intent that such teaching and advocacy be of a rule or principle of action and by language reasonably and ordinarily calculated to incite persons to such action, all* with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."[108] (9 F. R. D. 367, 391). (emphasis supplied.)

How critical the issue of "incitement to action" was to a disposition of the case in *Dennis* can be gauged by

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[108]This instruction was patterned after the instruction of the trial judge, approved by this Court, in *Gitlow v. New York*, 268 U. S. 652. The instructions of the District Court in the case herein contain no reference to the right to advocate or teach the abstract doctrine of forcible overthrow of Government. Neither the words "action" nor "incitement" appear anywhere in the instructions. All proposed instructions on these issues in varying language were rejected.

an examination of the majority opinion written by Judge Learned Hand and the concurring opinion of Judge Chase. In summary, Judge Hand held that the Act was constitutional "as the [trial] judge construed it." 183 F. 2d 201, 207. Judge Hand adopted the following criteria: (1) The case involved the area of political expression—political "utterances" and "agitation"; (2) utterances which call for unlawful action, which directly instigate to crime are not constitutionally protected; (3) utterances which are only designed to convince, which only affect the hearer's beliefs are protected by the First Amendment; (4) utterances which combine both peaceful persuasion and instigation to crime may or may not be punishable, dependent upon the application of the "clear and probable danger" rule. Thus, under the criteria adopted by Judge Hand the "nature of the words used" was bound to include incitement to action if the Smith Act were to be properly construed and applied under the Constitution. 183 F. 2d 201, 207, 212.

The gist of Judge Chase's concurrence may be summarized as follows: (1) the trial judge properly construed the statute as punishing only advocacy in language of incitement to action; (2) the statute, and the evidence, does not deal with both expressions of belief and calls to action; (3) utterances which only incite to action are not protected by the First Amendment; (4) if Congress reasonably finds that an utterance which incites to action presents a danger to the Government, it may proscribe such utterance; (5) under such circumstances, judicial

restraint requires upholding of the law and affirmance of the conviction, if the evidence be sufficient to prove the utterance was in language of incitement to action. 183 F. 2d 201, 235, 236.

Not a single Justice of this Court in *Dennis* differed with the construction of the statute by the lower courts insofar as the question of incitement to action was concerned. Thus the majority opinion of Chief Justice Vinson (Justices Reed, Burton and Minton concurring), after noting that the statute "requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence" 341 U. S. 494, 499-500, continues with the later statement in the opinion that even so, such advocacy coupled with such proscribed intent "contains an element of speech. For this reason, we must pay special heed to the demands of the First Amendment marking out the boundaries of speech." 341 U. S. 494, 502. "This is a federal statute which we must interpret as well as judge" (*Id.*, p. 502). Then, after reviewing the decisions, the Chief Justice states that "there remains the problem of whether the trial judge's treatment of the issue was correct" (*Id.*, p. 511). This is immediately followed by quotations from Judge Medina's instructions on incitement (first paragraph) and "clear and present danger" (second and third paragraphs) (*Id.*, pp. 511-12). On the issue of incitement, the Chief Justice states as follows:

> "*The first paragraph of the quoted instructions* calls for the jury to find the facts *essential* to establish

> the substantive crime, violation of Sections 2(a)(1) and 2(a)(3) of the Smith Act, involved in the conspiracy charge."[109] (341 U. S. 494, 512-13; emphasis supplied.)

It is true that at one point in his opinion Chief Justice Vinson appears to draw a line between advocacy and discussion. "It is directed at advocacy, not discussion" (341 U. S. at 502). However, it is clear that the Chief Justice was speaking there of advocacy of action, not advocacy of ideas. For in the very next sentence he noted that the jury had been properly instructed that there could be no conviction for "advocacy in the realm of ideas." That the distinction drawn between advocacy and discussion relates to the difference between a call to action and support of an idea is further emphasized, not only by the approval placed upon the trial judge's instruction to this effect, but also by the opinion's definition of the problem with which it was dealing: "If the Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required" (*Id.*, p. 509). After thus setting forth his construction of the facts as showing a conspiracy prepar-

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[109]The conspiracy statute (18 U. S. C., Sec. 371) punishes only those persons who conspire to commit an "offense against the United States." Unless the object of the conspiracy is a federal offense, there can be no conviction for conspiracy under 18 U. S. C., Section 371. There are no common-law offenses against the United States. *United States v. Hudson*, 7 Cranch 32; *Krulewitch v. United States*, 336 U. S. 440, 457. According to the opinion of Chief Justice Vinson, the construction of the statute by Judge Medina to include language of incitement to action was "essential" to establish the substantive offense, the object of the alleged conspiracy.

ing for action, the Chief Justice goes on to note that it contemplates a "call" to such action. "The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to *call* when the leaders, these petitioners, felt the time had come for *action* . . . convince us that their convictions were justified on this score" (*Id.*, pp. 510-11) (emphasis supplied). In addition, the opinion's emphasis upon the necessity of clear proof of the defendants' "power to bring about the evil" of an attempt at violent revolution sheds further light on the character of the "advocacy" condemned. The power to bring about the evil would be of no moment in a conspiracy which did not contemplate at least a call to action designed to bring about the evil.[110]

Justice Frankfurter, in his concurring opinion, notes the significance of Judge Medina's instructions on incitement. Justice Frankfurter states:

> "On the basis of the instructions, the jury found, for the purpose of our review, that the advocacy which the defendant inspired to promote was to be a rule of action, by language reasonably calculated to incite persons to such action, and was intended to cause the overthrow of the Government by force and violence as soon as circumstances permit. This brings us to the ultimate issues." (341 U. S. 494, 518.)

The opinion of Justice Frankfurter then stresses that utterances which directly instigate to unlawful action are historical exceptions to the broad freedoms protected by the First Amendment. The common law principle "that

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[110]Significantly the trial court below refused to consider the element of "power to bring about the evil" also. See discussion of clear and present danger, Point IV, pp. 259-274, *infra*.

a person who procures another to do an act is responsible for that act as though he had done it himself . . . was extended in Fox v. Washington, . . . *supra*, to words directed to the public generally which would constitute an incitement were they directed to an individual. It was adapted in Schenck v. United States, . . . into a rule of evidence designed to restrict application of the Espionage Act. It was relied on by the Court in Gitlow v. New York, . . . *supra*" (341 U. S. 494, 545). Discussing *Abrams, Schaefer* and *Pierce* which followed *Schenck*, Justice Frankfurter states: "The Court agreed that an incitement to disobey the draft statute could constitutionally be punished. It disagreed over the proof required to show such an incitement" (*Id.*, p. 536).[111]

Justice Jackson stated: "I think direct incitement by speech or writing can be made a crime . . . . Of course, it is not always easy to distinguish teaching or advocacy in the sense of incitement from teaching or advocacy in the sense of exposition or explanation. It is a question of fact in each case" (341 U. S. 494, 571-2). A conspiracy to advocate and teach in language of incitement to action was in the view of Justice Jackson a criminal offense like other criminal offenses, not subject to constitutional objection (*Id.*, p. 571).

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[111]"We frequently have distinguished protected forms of expression from statements which 'incite to violence and crime and threaten the overthrow of organized government by unlawful means.' Stromberg v. California, 283 US at 369, 75 L ed 1123, 51 S Ct 532, 73 ALR 1484. See also Near v. Minnesota, 283 US at 716, 75 L ed 1367, 51 S Ct 625; De Jonge v. Oregon, 299 US at 365, 81 L ed 284, 57 S Ct 255; Cantwell v. Connecticut, 310 US 296, 308, 84 L ed 1213, 1220, 60 S Ct 900, 128 ALR 1352; Taylor v. Mississippi, 319 US at 589, 87 L ed 1606, 63 S Ct 1200." Justice Frankfurter in *Dennis v. United States*, 341 U. S. 494, 545.

Although the issue of incitement to action is not specifically discussed in the dissenting opinions of Justices Black and Douglas, it appears clear from those opinions that they assumed that the Constitution at the very least demanded the construction by the trial court in that respect.

Thus, every Justice in *Dennis*, from the inception of the case to its conclusion, was agreed that the Smith Act punishes only advocacy and teaching in language of incitement to action. The fundamental issue throughout was whether, even so, the Act was constitutional in the light of the protection offered to freedom of political expression by the First Amendment. The varying formulae adopted by the different members of this Court and by the Court of Appeals—"clear and present danger"; "clear and probable danger"; "legislative rule of reason"; "judicial restraint"; "conspiracy"—indicate the troublesome nature of the constitutional question even when applied to such narrowly defined utterances of "incitement to action."

Here, the courts below have indeed "kicked the beam." They have construed *Dennis* as holding that, given the specific intent, the Smith Act punishes utterances which embody the idea of forcible overthrow of the Government even without any call or instigation to action. It is submitted that *Dennis* did not so hold; that no decision of this Court has ever so decided directly or indirectly; that such views were never adopted in this country by any responsible person or authority; and, indeed, this position ceased to be accepted in England before the close of the 18th century.

C. The Legal and Historical Roots of First Amendment Rights to Full and Free Discussion and Advocacy Contrasted With Utterances Which Incite to Unlawful Action.

Professor Chafee observes that the framers of the Constitution and the Bill of Rights "did not invent the conception of freedom of speech as a result of their own experiences of the last few years. The idea had been gradually molded in men's minds by centuries of conflict. It was the product of a people of whom the framers were merely the mouthpiece. Its significance was not fixed by their personality, but was the endless expression of a civilization." *Freedom of Speech* (1920), p. 31. Thus, the nature and extent of freedom of political expression under the Constitution requires not only an examination of judicial precedents, but an examination of the history which bears significantly on the issue here involved.

Long before the founding of the nation, Montesquieu[112] stated as follows:

> "Words carried into action assume the nature of that action. Thus a man who goes into a public marketplace to incite the subject to revolt, incurs the guilt of high treason, because the words are joined to the action, and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal, but when they are annexed to a criminal action: everything is confounded, if words are construed into a capital

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[112]The influence of the writings of Montesquieu on the founders of America, and American institutions, has been marked. Clough, *Our Long Heritage* (1955), pp. 2, 179 *et seq.* See also, *Federalist*, No. XLVII; Elliot, *Debates in the State Conventions on the Federal Constitution* (1907 ed.), 5 vols.

crime, instead of considering them only as a mark of that crime."

The Spirit of Laws (1873 ed.), Vol. I, Book XII, Ch. XII, p. 223.

The aforesaid conclusion of one of the leading thinkers in an age of rationalism and natural law synthesizes the sanguinary struggles of men in different centuries to eliminate the varying restraints placed upon the expression of ideas antagonistic to existing religious, political or economic orders. By the age of Montesquieu, "freedom of speech assumes the character of an ideal which, apart from particular restraints, is deemed of intrinsic merit to the progress of civilized life. In its first aspect it is primarily a rallying cry of minorities eager for expression. In its second it arrays itself as a philosophic truth to which history lends reality." Landis, J. M., *Freedom of Speech and of the Press* in VI Ency. of Soc. Sci. 455 (1931).

This Court has had occasion to discuss the historical background of the First Amendment. See, for example, *Near v. Minnesota,* 283 U. S. 697, 713; *Grosjean v. American Press Co.,* 297 U. S. 233, 245; *Lovell v. Griffin,* 303 U. S. 444, 451; *Dennis v. United States,* 341 U. S. 494, 521. Perhaps more important than that history is the philosophy which underlies it. Thus, without retracing the struggles against constructive treason, censorship of the press and seditious libel, it is pertinent to observe here the conclusions which the legal historians have drawn from those ancient struggles in the past. In Stephen's *History of the Criminal Law of England* (1883 ed.), Vol. II, p. 299, the author states that "two different views may be taken of the relation between rulers and their subjects." The first view regards the ruler

as the superior of the subject, and under such view "it must necessarily follow that it is wrong to censure him openly." On the other hand, if "the ruler is regarded as the agent and servant," then "this sentiment must be reversed." To those who hold this second view, "there can be no such offense as sedition. *There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and there may be incitements to such offenses, but no imaginable censure of the government, short of a censure which has an immediate tendency to produce such a breach of the peace, ought to be regarded as criminal*" (emphasis supplied).

Holdsworth, quoting these views of Stephen, states: "The first of these two views was the accepted view in the seventeenth century. The second was gathering strength during the latter part of the eighteenth century, and is now the accepted view." *History of English Law* (2nd ed.), Vol. VIII, p. 338.

Of the early American scene, Professor Chafee has this to say: "The founders had seen seventy English prosecutions for libel since 1760, and fifty convictions under that common-law rule, which made conviction easy . . . The First Amendment was written by men to whom Wilkes and Junius were household words, who intended to wipe out the common law of sedition, and make further prosecutions for criticism of the government *without any incitement to law-breaking,* forever impossible in the United States of America." *Freedom of speech* (1920), pp. 22, 23 (emphasis supplied). It is not difficult to annotate this conclusion. See Elliot's *Debates in the State Conventions on the Federal Constitution* (2nd ed., 1907)), Vol. 2, pp. 93, 432, 435, 449, 453,

455, 469, 488, 552; Vol. 3, pp. 203, 218, 441, 443-51, 461, 469, 588, 610, 620, 626; Vol. 4, pp. 137-53, 161-66, 209-10, 314-15, 337.

As late as 1819, Jefferson wrote to Judge Spencer Roane: "A legislature had passed the sedition law. The federal courts had subjected certain individuals to its penalties of fine and imprisonment. On coming into office, I released these individuals by the power of pardon committed to executive discretion, which could never be more properly exercised than when citizens were suffering without the authority of law, or which was equivalent, under a law unauthorized by the constitution, and therefore null." Works, *supra,* Vol. XII, p. 138. Jefferson considered the defeat of the Federalists and the demise of the Sedition Act in 1800 "as real a revolution in the principles of our government as that of 1776 was in its form" (*Id.,* p. 136).[113] The First Amendment to Jefferson meant "that the legislative powers of the government reach actions only, and not opinions." He stated "that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy . . .; that it is time

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[113] *Cf.*, the statement of the Court of Appeals here: "The law which was passed in 1940 was passed to meet emergencies created by war although not especially to meet the threat involved in this case. That enactment has been denounced as the first peacetime sedition law since 1798, although anyone who believes the country was not at war in 1940 does not squarely face the facts of life. If the founders were advised that statute was necessary to meet the threat of the excesses of the French Jacobins then tending toward world-wide imperialism with a fatalistic zeal and a crusading flair and therefore compatible with the new Constitution, the Act of 1940 was probably advisedly deemed necessary by the Congress to provide for the national defense and protect the national ideals and aspirations." [Clk. R. 136.]

enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." Works, *supra*, Vol. II, pp. 440-1. About one hundred years later, this Court, quoting the words of Jefferson, stated: "In these two sentences is found the true distinction between what properly belongs to the Church and what to the State." *Reynolds v. United States*, 98 U. S. 145, 163.

If history, therefore, is to be an aid in the discovery of the rational principle which marks the line between where the freedom of an individual ends and the power of the State begins—at least in the area of freedom of political expression—the true rule would appear to be that only unlawful action and utterances which directly incite to unlawful action are the exception to the fundamental societal principles embodied in the First Amendment.[114] Such appears to be the message of history, translated into living law by an almost unbroken line of decisions of this Court. This confluence of law and history is exemplified in the words of Chief Justice Hughes, writing for a unanimous court, in *De Jonge v. Oregon*, 229 U. S. 353, 364-5:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. The greater the

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[114] "Only in one field is compromise to be excluded, or kept within the narrowest limits. There shall be no compromise of the freedom to think one's thoughts and speak them, except at those extreme borders where thought merges into action." Cardozo, *Mr. Justice Holmes*, 44 Harv. L. Rev., 682, 688 (1931).

importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

The application of these principles in particular cases throughout the history of this Court shows no intent to deviate from the line drawn between advocacy of ideas and incitement to action. Whatever differences may have occurred between the Justices as to the sufficiency of proof in different cases, tested by the requirements of the Constitution, no statute punishing speech has ever been construed "to assimilate agitation, legitimate as such, with direct incitement to violent resistance." Judge Learned Hand in *Masses Pub. Co. v. Patten,* 244 Fed. 535, 540 (D. C. N. Y., 1917).

In *Fox v. Washington,* 236 U. S. 273, the statute punished writings inciting to the commission of crimes, or which "tended" to incite to their commission. Justice Holmes stated: "It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." The statute, as construed, deals only with conduct which "would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged . . ." (*Id.,* p. 277). In *Schenck v. United States,* 249 U. S.

47, Justice Holmes analogized the case to a man "falsely shouting fire in a theatre, and causing a panic" or the utterance of words which may have "all the effect of force" (*Id.*, p. 52).[115] In *Frohwerk v. United States*, 249 U. S. 204, 206, Justice Holmes stated that to make "criminal the counselling of a murder within the jurisdiction of Congress would [not] be an unconstitutional interference with free speech." In *Debs v. United States*, 249 U. S. 211, the same Justice expressed the view that the general theme of the speech would not be enough to protect the utterer, if passages in the same speech contained incitements to obstruct the draft "directly given" (*Id.*, p. 213). In all these cases, the broad immunity granted by the First Amendment is in fact emphasized by the limited exceptions instanced by Justice Holmes. That the interest to be protected was freedom of speech on the one hand, and the right of the Government to deal with unlawful action and incitements to unlawful action on the other hand, seems evident.

The division of opinion in this Court which followed thereafter shows no disagreement on this issue. In *Abrams v. United States*, 250 U. S. 616, the majority thought that the language of the leaflets plainly incited to "dissaffection, sedition, riots . . ." (p. 623). Justice Holmes thought that the statements were merely "expressions of opinion and exhortations." In *Pierce v. United States*, 252 U. S. 239, 273, Justice Brandeis stated: "The fundamental right of free men to strive for

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[115] "The Court agreed that an incitement to disobey the draft statute could constitutionally be punished. It disagreed over the proof required to show such an incitement" Justice Frankfurter in *Dennis v. United States*, 341 U. S. 494, 536, referring to the split in the opinions which followed *Schenck*.

better conditions through new legislation and new institutions will not be preserved, if efforts to secure it by argument to fellow citizens may be construed as criminal incitement to disobey the existing law." In *Schaefer v. United States,* 251 U. S. 466, 493, Justice Brandeis added: "The jury which found men guilty for publishing news items or editorials like those here in question must have supposed it to be within their province to condemn men not merely for disloyal acts, but for a disloyal heart; provided only that the disloyal heart was evidenced by some utterance."

Because of the nature of the statute involved in *Gitlow v. New York,* 268 U. S. 652, punishing the advocacy and teaching of the forcible overthrow of organized government, it may be appropriate to consider the decision of this Court in that case in more detail. At the outset, this Court noted the construction of the statute by the trial court (p. 661):

> "The court, among other things, charged the jury, in substance, . . . that a mere statement or analysis of social and economic facts and historical incidents, in the nature of an essay, accompanied by prophecy as to the future course of events, but with no teaching, advice, or advocacy *of action,* would not constitute the advocacy, advice, or teaching of a doctrine for the overthrow of government within the meaning of the statute; that a mere statement that unlawful acts might accomplish such a purpose would be insufficient, *unless* there was a teaching, advising, and advocacy of *employing such unlawful acts* for the purpose of overthrowing government; and that if the jury had a reasonable doubt that the Manifesto did teach, advocate, or advise the duty, necessity, or propriety of using unlawful means for the

overthrow of organized government, the defendant was entitled to an acquittal." (Emphasis supplied.)

This Court stated: "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of *incitement to any concrete action* . . . It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, *but the advocacy of action for the accomplishment of that purpose* . . . This [Manifesto] is not the expression of philosophical abstraction, the mere prediction of future events; *it is the language of direct incitement* . . . That the jury were warranted in finding that the Manifesto advocated not merely the abstract doctrine of overwhelming organized government by force, violence, and unlawful means, *but action to that end*, is clear . . . That utterances *inciting to the overthrow of organized government by unlawful means* present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is clear" (pp. 664-69) (emphasis supplied).

Concurring in *Whitney v. California*, 274 U. S. 357, Justice Brandei stated (p. 376): "The wide difference between advocacy and incitement . . . must be borne in mind." In *Stromberg v. California*, 283 U. S. 359, Chief Justice Hughes did not doubt that statutes punishing utterances which "incite to violence and crime" were valid, but "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity [free political discussion] is repugnant to the guaranty of liberty contained in the 14th Amendment" (p. 369).

As we have already noted, Chief Justice Hughes stated that the very "security of the Republic" depends upon a

recognition of the exceptional character of the "incitement to action" limitation upon the indispensable right to freedom of political expression guaranteed by the First Amendment. A pervasive recognition of this principle appears in all subsequent relevant decisions of this Court. In *Herndon v. Lowry,* 301 U. S. 242, the law as construed was held invalid because not limited to "incitement to violent interference with any given activity or operation of the state" (p. 261). In *Cantwell v. Connecticut,* 310 U. S. 296, the statute was not narrowly drawn to define and punish "specific conduct"; it was held invalid because it purported to punish more than incitements to "violence and breaches of the peace" (p. 310). In *Chaplinsky v. New Hampshire,* 315 U. S. 568, this Court spoke of "certain well-defined and narrowly limited classes of speech . . .—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (pp. 571-2). In *Murdock v. Pennsylvania,* 319 U. S. 105, it was noted that the accused was "not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation" (p. 116). In *Thomas v. Collins,* 323 U. S. 516, a majority thought that free trade in ideas "means free trade in the opportunity to persuade to action, not merely to describe facts," but that the limit of the right would be passed "when to this persuasion other things are added which bring about coercion" (p. 537). In *Musser v. Utah,* 333 U. S. 95, Justice Rutledge repeated that "At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of prob-

ability that the substantive evil actually will result" (p. 101). And in *Winters v. New York,* 333 U. S. 507, both majority and dissent recognized the importance of limiting the statute only to punishment of utterances which "become vehicles for inciting violent and depraved crimes," differing only on the need for a more certain specification of the publications interdicted in the light of First Amendment guarantees (pp. 519, 527).

Coming to the contemporary scene, the unifying principle of the aforesaid cases continues unabated in the recent decisions of this Court. In *American Communications Association v. Douds,* 339 U. S. 382, Chief Justice Vinson emphasized that repression could be directed only against "unlawful conduct and, under some circumstances, *against incitements to commit unlawful acts* . . . Only, therefore, when force is very likely to follow an utterance before there is a chance for counter-argument to have effect may that utterance be punished or prevented" (pp 394, 395) (emphasis supplied). In *Feiner v. New York,* 340 U. S. 315, the accused passed "the bounds of argument or persuasion and [undertook] incitement to riot." The police were not "powerless to prevent a breach of the peace" (p. 321). At the very term that *Dennis* was decided, Justice Reed, with whom the Chief Justice and Justice Minton joined, stated: "Tolerant as we are of all political efforts by argument or persuasion to change the basis of our social economic or political life, *the line is drawn sharply and clearly* at any *act* or *incitement to act* in violation of our constitutional processes." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 193 (emphasis supplied). As late as *Beauharnais v. Illinois,* 343 U. S. 250, Justice Reed stated (p. 279): "So important to a constitutional democracy is the right

of discussion that any challenge to legislative abridgement of those privileges of a free people calls for careful judicial appraisal [citing *De Jonge v. Oregon, supra*]. It is when speech becomes an incitement to crime that the right freely to exhort may be abridged."[11]

Since the grant of certiorari herein, this court has decided *Pennsylvania v. Nelson,* .....U.S.....; 100 L.ed. (Adv. Op.) 415. Justices Reed, Burton and Minton dissenting therein stated (a proposition on which there was no conflict with the opinion of the majority): "We look upon the Smith Act as a provision for controlling incitements to overthrow by force and violence the Nation, or any State, or any political subdivision of either." *Ibid.*, p. 426.

From this analysis of political and legal history, at least the following conclusions can appropriately be drawn: The 18th Century in England was marked by a changing conception of the relation between ruler and subject, a change from the view of rule by divine right to rule by consent of the governed; the social and economic changes which brought about this changed conception necessarily engendered the libertarian and utilitarian philosophy that if rulers were to be responsive to the will of the people, the broadest freedom of political expression must be per-

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[11] In opposition to the petition for writ of certiorari, the United States argued this Court "has *never* suggested that the distinction" between freedom of political expression and the limitations upon that right "must be phrased in terms of incitement". (Br. p. 55). This was not the theory of the United States at the trial (Supp App. to App. Reply Br., pp. 35-6). The necessity of supporting the rulings of the courts below, with their definite exclusion of the issue of "incitement to action" from the case, has apparently brought about a change of position on the part of the prosecution. Mere expediency, however, cannot obliterate the political and legal history of centuries, nor can civil courts become the mere instruments of executive policy.

mitted;[117] the advent of this philosophy marked the decline of the related offenses of constructive treason and seditious libel and, in England, by the end of the 18th century, prosecutions for these offenses had virtually ceased to exist.[118]

In the United States, the adoption of the Constitution and the First Amendment, together with the defeat of the Federalist Party in 1800, emphasized that the federal government was to be truly a government of limited powers existing solely by consent of the governed and that freedom of speech, press and assembly was an area necessarily free from governmental intrusion[119] in a self-governing society; that the Jeffersonian philosophy contemplated the power of government as limited only to the punishment of unlawful action, while leaving unimpaired the expression of beliefs, opinions or ideas, no matter how much they touched the "heart of things;[120] that this

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[117] "Other liberties are held *under* governments, but the liberty of opinion keeps Governments themselves in due subjection to their duties." Erskine, *Defense of Paine* in Writings of Thomas Paine (Wheeler ed., 1908), vol. I, p. 147.

[118] "Since that time, the utmost latitude of criticism and invective has been permitted to the press, in discussing public means and measures. The law has rarely been appealed to, even for the exposure of malignity and falsehood. Prosecutions for libel, like the censorship, have fallen out of our constitutional system." May, *Constitutional History of England* (1880), vol. II, p. 213.

[119] "The general principle of free speech, it seems to me, must be taken to be included in the 14th Amendment, in the view of the scope that has been given to the word 'liberty' as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation *than is allowed to Congress by the sweeping languague that governs, or ought to govern, the laws of the United States.*" Justice Holmes in *Gitlow v. New York*, 268 U. S. 652, 672 (emphasis supplied).

[120] "If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Works, *supra*, vol. IX, p. 195, The First Inaugural Address, March 4, 1801.

Court has never doubted since its inception that the security of the nation depends upon untrammeled freedom of political expression; that in testing the constitutional validity of statutes which purport to limit that right this Court has accepted only the well defined exception familiar to the founding fathers, that speech is punishable only when proven to be a direct incitement to unlawful action; that in the area of political expression, only those can be punished (1) who directly incite to unlawful action, the instigators of crime (accessory before the fact); who (2) thus incite with specific intent to accomplish the unlawful action (*mens rea*); and (3) who thus wilfully incite to action under circumstances where the unlawful action is very likely to come about (attempt); that a statute by its terms or as construed which permits the punishment of other activities in the area of political expression constituting speech, press and assembly cannot stand consistent with the broad immunities granted by the First Amendment and the limitations on the powers of government in our constitutional system.[121]

D. The Construction of the Smith Act by the Courts Below—Instructions to the Jury.

In light of the aforesaid, we now examine "whether the judge's charge properly explained to the jury what it is that the Smith Act condemns." If the statute under the Constitution punishes only language of incitement to action, only language which includes a call for action, a direct instigation to crime, it would at the outset appear incongruous to assert that the jury must have so under-

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[121] "Where the First Amendment applies, it is a denial of all governmental power in our Federal system." Justice Frankfurter in *Marsh v. Alabama*, 326 U. S. 501, 511.

stood it—when both the trial court and the Court of Appeals did not. As we have demonstrated, the trial court insisted that the statute punished all statements of the proscribed doctrine, "whether in language of incitement or not," and the Court of Appeals affirmed that instructions on incitement were "supererogatory" since the agreement of the accused was punishable even if the contemplated advocacy and teaching were "immunized by the constitutional guarantees."

Clearly, such words as "advocate" or "teach" do not necessarily connote to the ordinary person "incitement to action" or "instigation to crime." They are generally words which mean the highest form of appeals to reason, of discussion and debate, of argument and counter-argument. At least, the jury before whom the "advocates" here argued the cause might have so understood. Just as there can be discussion of facts without advocacy or teaching, so there can be advocacy or teaching of ideas without incitement to action. "The press does have the right, which is its professional function, to criticize and to advocate." Justice Frankfurter in *Pennekamp v. Florida*, 328 U. S. 331, 365. Indeed, unless there be precise limitation and definition, the "supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation" may put the speaker "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his

intent and meaning." *Thomas v. Collins*, 323 U. S. 516, 535.[122]

The trial court's instructions followed precisely its theory of the case, all of which was adopted by the Court of Appeals. The Smith Act, according to the trial court, punishes all advocacy and teaching of the forcible overthrow of the Government if accompanied by a specific intent, and the jury was so instructed [R. 13,728-73, App. Item 2(a), 2(p), pp. 3-69]. The word "incitement" does not appear in the instructions at all. The words "action," "incitement to action," "call for action," or "direct instigation to crime" are totally absent from the instructions. The jury was nowhere in the instructions or at any other point in the case told that the Smith Act does not denounce the abstract doctrine of forcible overthrow of the Government. All of this in varying forms the trial court, it should be recalled, was asked to instruct the jury by both the petitioners and by the United States, and refused.

The trial judge charged the jury it could convict if the evidence showed beyond a reasonable doubt that the conspiracy as alleged in the indictment (the indictment

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[122]Justice Holmes gave the same warning in *Gitlow*. He stated: "Every idea is an incitement. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result" (p. 673). Coming as this did from the writer of the opinion in *Fox v. Washington*, it emphasizes the importance of clearly distinguishing between activities which directly incite to unlawful action and protected forms of activities, the most important "question of fact" in every prosecution of speech.

paraphrased the statute without limitation) was formed at the time alleged; that the accused wilfully became a member thereof; with the proscribed specific intent; and if an overt act was committed in furtherance of the conspiracy. This instruction was twice repeated [Inst. 11-G, R. 13,746-7, App. Item 2(d), p, 24; Inst. 14, R. 13,758, App. Item 2(h), p. 40]. The Court of Appeals held that there was evidence from which the jury might find (a) that the "conspiracy as charged in the indictment" was formed in 1940; (b) that each of the accused knowingly "entered into the combination"; (c) that "at least one overt act" was committed; (d) that each of the accused joined the conspiracy with the "specific intent" [Clk. R. 132]. Thus, in the instructions, and refusals to instruct, in their purposeful exclusion of the issue of "incitement" from consideration by the jury, the court below gave to the Smith Act an all-encompassing construction, neither supported by *Dennis* or *Gitlow* nor by constitutional law or history, as we have attempted to show.

Moreover, where the trial court defined the words "advocate" and "teach" in its instructions, it was careful to avoid any definition of the nature of those words in terms of a call for action or instigation to crime; this despite the proffered instructions of petitioners and the United States. Thus, the court instructed the jury that the word "advocate" means "to urge" or "to plead in favor of" or "support" or "vindicate" or "recommend publicly." The jury was told that the word "teach" means "to instruct" or "show how" or "guide the studies of " [Inst. 12-A, R. 13,752, App. Item 2(f), p. 32]. Without in any way having informed the jury that such

advocacy or teaching, so broadly defined, must be in language of incitement to action, a reasonable jury could assume that the Smith Act punishes any discussion or advocacy or teaching of the idea of the forcible overthrow of the Government under any circumstances in any place and in any manner, so long as the jury found the requisite specific intent.[123]

At every point in its instructions, the trial court made certain to leave this unlimited construction of the Smith Act intact. The court instructed the jury that "prediction or prophecy" is not advocacy [Inst. 12-A, R. 13,752, App. Item 2(f), p. 32]. This is of course plain, but the trial court did not instruct the jury that the contemplated advocacy which they were bound to find from the evidence was advocacy in language of incitement to action with the intent that such advocacy be as a rule or principle of action.

Because the indictment did not allege that petitioners conspired to advocate and teach the forcible overthrow of the Government by unlawful or unconstitutional means other than force and violence, the court instructed the jury that any advocacy or teaching which did not include the urging of force and violence "as the means" of overthrowing the Government was not "within the issue of the

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[123]Dictionary definitions include the following: "urge"—"to press by inquiry or statement; to adduce or bring forward arguments, allegations, etc."; "plead"—"to contend in debate; to wrangle, argue *with, against*"; "support"—"to back up in a statement or an opinion"; "vindicate"—"to justify or uphold by evidence or argument"; "recommend"—"to communicate to a person"; "instruct"—"to furnish with knowledge or information"; "show how"—"to make known by statement or argument"; "guide the studies"—to direct the "application of mind to the acquisition of learning." Oxford English Dictionary (1933); Shorter Oxford English Dictionary (1933).

indictment" [Inst. 12-A, R. 13,752, App. Item 2(f), p. 32]. The instruction added nothing however to the meaning of the Smith Act insofar as the distinction between the exposition of ideas and advocacy and teaching in language of incitement to action was concerned. One can urge a point of view without calling upon persons to act upon that viewpoint. Urging the duty and necessity of the violent overthrow of the Government can be either advocacy of an idea or concept on the one hand or a call to action on the other. The jury was not informed that the Smith Act does not punish "advocacy" or "urging" or "vindicating" the forcible overthrow of the Government as a matter of abstract doctrine (*American Communications Associations v. Douds*, 339 U. S. 382, 439-42],[124] but that the Smith Act punishes only such advocacy or urging when in language reasonably and ordinarily calculated to incite persons to action.

Moreover, when the trial court informed the jury that the petitioners had some rights under the Constitution, it was again careful to exclude any protection for utterances found by the jury to be equivalent to the idea of forcible overthrow of the Government. The jury was told that petitioners' "general right," "in common with all other persons living under our Constitution" to "advo-

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[124]To Justice Jackson's recital of "revolutionary" utterances, a more contemporary statement could be added: "The soul of man cannot be altogether and forever bound in, a fact by virtue of which with time the most unyielding despotism must come to earth. *On it rests the inalienable right of revolution which our fathers exercised in the Declaration of Independence.*" Wiley Rutledge, *A Declaration of Legal Faith* (1947), p. 7 (emphasis supplied).

cate opinion" was not affected by the lack of popular support therefor. The Court went so far as to give the jury specific illustrations of the character of opinions falling within this "general right"; these were: "the advocacy or teaching of socialism," "criticism" of "our system of Government and the Government itself" and of "the foreign policy of the United States and the role being played by this country in international affairs" and "praise" of "the foreign policy of other governments and the role being played by these governments in international affairs" [Insts. 12-E, 12-F, R. 13,754-55, App. Item 2(f), pp. 34-36]. Not only did the Court fail to include in the list of opinions which might lawfully be expressed the crucial one, the proposition that the government should be overthrown by force and violence, but it made it clear that this opinion was specifically excluded. For after specifically enumerating the opinions which might be lawfully expressed, the Court told the jury: "No inference of conspiracy to advocate and teach the necessity and duty of overthrow and destruction of the Government of the United States by force and violence . . . may be drawn from such expressions alone. The burden is upon the prosecution to prove beyond a reasonable doubt that the defendants conspired to advocate the duty and necessity of the overthrow and destruction of the government by force and violence" [Insts. 12-E, 12-F, 12-G, R. 13,754-6, App. Item 2(f), pp. 34-6]. Thus the Court explicitly told the jury that while the petitioners had the right to advocate other opinions they could not

legally advocate the opinion that government should be violently overthrown.[125]

In attempting to justify the exclusion of the issue of incitement by the trial court from the jury's consideration, the opinion of the Court of Appeals serves only to emphasize the vice of the unlimited construction given the Smith Act under the Constitution. The Court of Appeals states, first, that the indictment "by its inherent terms" charged that "the language of incitement was used" [Clk. R. 117], meaning, of course, that the words do not explicitly appear in the indictment at all. If the element of incitement was "inherent" in the indictment, the duty rested all the more upon the trial judge to instruct the jury explicitly and unequivocally on the issue. *Bollenbach v. United States,* 326 U. S. 607, 613. Where the Constitution fixes the standards for the determination of where the freedom of an individual ends and the power of the State begins, an accused is entitled to have the jury instructed precisely in accordance with those standards. See, *United Brotherhood v. United States,* 330 U. S. 395; *Terminiello v. City of Chicago,* 337 U. S. 1; *St. Paul Fire and Marine Insurance Co. v. Bachmann,* 285 U. S. 112. The issue of "incitement to action" is

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[125]In another portion of this brief petitioners argue that the evidence was insufficient to support the charge contained in the indictment. The record is barren of any evidence that the contemplated advocacy and teaching of Marxism-Leninism by the petitioners was to be in language of incitement to action. This most important "issue of fact" was removed from the jury's consideration, leaving them to determine that any contemplated "teaching" or "instructing" or "support", etc., etc. of the principles of Marxism-Leninism, with unlawful intent, was punishable under the Smith Act despite the Constitution. How serious was the error committed here can be gathered from the dissent of Judges Hastie and Maris in *United States v. Mesarosh,* 223 F. 2d 449, 459-64 (C. A. 3, 1955), where the instruction on incitement to action was given (p. 460), the Judges disagreeing on the sufficiency of the evidence with respect thereto.

one of the most important questions of fact which a jury in a speech case has to decide, for upon the determination of that issue rests the power of the court to apply the sanctions of the law to the accused despite the protective guarantees of the Constitution.

Moreover, instructions "should be clear and understandable, whether they purport to define issues of fact or to state the law applicable to a particular situation. They should be definite and certain, as applied to the facts of the case at bar, leaving nothing to inference. They should be intelligible, free from obscurity, involvement, ambiguity, metaphysical intricacy and doubt. The language of an instruction should be so plain that no doubt can arise as to its meaning, and that there is no chance of misunderstanding." 53 *Am. Jur.*, "Trial," Section 545, p. 434. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, 326 U. S. 607, 613. See, *Kraus & Bros. v. United States*, 327 U. S. 614, 627.

The Court of Appeals stated "that an unlawful combination and agreement becomes a positive crime only when some of the proved conspirators enter the field of action pursuant to the criminal design. Therefore, if the conspiracy did not become a rule of action pursuant to the proscribed intent, there would have been no violation of the conspiracy statute" [Clk. R. 129]. But this begs the question here; it does not answer it. If the law punishes only a "criminal design" to advocate *in language of incitement to action*, the petitioners were entitled to an instruction that no petitioner could be found guilty unless he was a party to such criminal plan. If there was no such "criminal design," the mere fact that one of the accused entered the "field of action"—as, for example, participated

in a lawful public meeting held under the auspices of the Communist Party—would not make criminal the agreement which was not criminal in its inception. Under the instructions, the entry into the "field of action" could be established by showing entry into the field of opinion, absent any relationship to a call to action. See the trenchant discussion by Judge Frank in *United States v. Ausmeier*, 152 F. 2d 349, 356-8 (C. A. 2, 1945).

The fact is that the Court of Appeals, like the trial court, held that the question of incitement was properly excluded entirely from the jury's consideration [Clk. R. 128-9]. The Court took the position that the 1948 codification of the Criminal Code had effected drastic changes in the issues of a Smith Act prosecution [Clk. R. 110-11], that unlike *Dennis*, a "standard conspiracy" was here charged, and that instructions on incitement to action would now be supererogatory. A new construction and application has been given to the Smith Act by the courts below: that any violation of the literal terms of the statute is punishable so long as the jury finds the proscribed intent.[126] This is the traditional form of the repressive laws of the Middle Ages and the prevalent form of the treason and sedition statutes of the 16th and 17th centuries in England, so "capably" administered by Star Chamber and the tribunal of a Jeffrys in the King's behalf. The question presented is whether, consistent with constitutional law and history, such a statute as construed below can be upheld.

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[126]In opposition to the petition for writ of certiorari, the respondent stated that it was "immaterial" whether the Court of Appeals was correct in the reasoning which led the Court to approve the exclusion of the issue of incitement to action from the case because, according to respondent, a "specific charge was not required" on incitement to action under the Smith Act as interpreted by this Court in *Dennis* (Br. pp. 59-60). As we have shown, this was not the view of the respondent in the trial court (*supra*, p. 112, n. 69.)

E. The Validity of the Smith Act as Construed by the Courts Below.

Our résumé of law and history above conclusively establishes, it is respectfully submitted, that the construction of the statute by the courts below is constitutionally invalid. Some additional observations should be made in conclusion.

(1) If all that were necessary to dispose of the issue here was "practical expediency," the holdings of the courts below could not be sustained. No "practical" reason can be advanced for excluding the question of incitement from Smith Act prosecutions, unless it be that it is easier to convict outside the law than within it. In virtually every case which has followed *Dennis*, the trial and appellate courts have stressed the importance of the instruction on incitement to action. In the second Smith Act prosecution in New York, Judge Dimock not only gave the instruction approved by this Court, but in further amplification told the jury, in effect, that words of incitement to action means words which would inflame or spur some ordinarily reasonable person *to act—words which cause a reasonable person to act; and not merely to think things over. United States v. Flynn*, unreported [D.C. S.D. N.Y., 1953, C. 137-7] (emphasis supplied). District Judge Chesnut gave the instruction in *Frankfeld v. United States*, the Baltimore prosecution. On appeal, Chief Judge Parker stated:

> "The judge made it clear that the Communist Party could teach the abstract doctrine of overthrowing the government by force so long as it did not advocate action to that effect, saying:
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> "'And in this connection I further instruct you that the Smith Act is not aimed against the teaching

of the mere abstract doctrine of overthrowing the government or the mere teaching of the historical doctrine of Marxism or Leninism. The Communist Party and its members are entitled to do this so long as their teaching does not go to the extent of advocating action for the accomplishment of a violent revolution by language reasonably and ordinarily calculated to incite persons to such action.'"

198 F. 2d 679, 687 (C. A. 4, 1952).

District Judge Marsh gave the incitement instruction in Pittsburgh, *United States v. Mesarosh*, 223 F. 2d 449, 460 (C. A. 3, 1955), informing the jury that it was an essential ingredient of the offense charged. The instruction was given by District Judge Picard in the Smith Act trial in Detroit; by District Judge Harper in the trial in St. Louis; and by District Judge Breitenstein in the trial in Denver. Only two trial judges, both in the Ninth Circuit, in trials which followed the one herein, emulated the trial court below, and this in almost verbatim language.

(2) The statute, as construed, undermines principles of liberty and freedom which this Court has uniformly defended. Justice Holmes once stated that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U. S. 644, 654-5. In *Abrams v. United States*, 250 U. S. 616, 6[illegible], Justice Holmes added that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." As to the character of that "competition," this Court stated: "In the realm of religious faith, and

in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U. S. 296, 310. A pervasive recognition of these truths runs through the varying opinions of this Court. Only recently this Court struck down infringements upon "the freedoms that are the ultimate values of all democratic living". Justice Clark in *Wieman v. Updegraff*, 344 U. S. 183, 188.

(3) While this Court has denied that there is a constitutional "right to revolt," or to attempt or conspire to forcibly overthrow the Government, or to incite to action for such purpose, it has never held that the Constitution prohibits any advocacy or discussion or teaching of the idea of forcible overthrow of the Government. As Justice Jackson stated: ". . . we cannot ignore the fact that our own Government originated in revolution and is legitimate only if overthrow by force may sometimes be justified. That circumstances sometimes justify it is not Communist doctrine but an old American belief." *American Communications Association v. Douds*, 339 U. S. 382, 439.

Nor should it be overlooked that a statute which punishes advocacy and teaching of the overthrow of the Government by force and violence, as broadly construed by the courts below, stands as a permanent censor over the minds of men. Today the "principles of Marxism-Leninism" may be thus proscribed; yesterday it was the

principles of the Jeffersonian Republicans; and the day before yesterday the religious creeds which offended Henry VIII or James II. There is no certainty under such a law that today's orthodoxy will not be tomorrow's heresy. Here, indeed, "a page of history is worth a volume of logic." Professor Chafee states:

> "There are fashions in sedition laws as in everything else. The draftsmen of 1798 went for a model to the English seditious libel prosecutions just ahead of their day, and imported into their statute phrases like 'intent to bring the government into contempt or disrepute.' The draftsmen of 1940 likewise found their model in the sedition laws just ahead of them, which happened to be the New York Anarchy Act and the Criminal Syndicalism Acts. Aside from the greater severity of sentences, the only big change during the intervening hundred odd years is in phraseology. Instead of saying 'to excite against the government the hatred of the good people of the United States,' sedition laws now say, 'to advocate the overthrow of the government by force or violence.' Yet the new words work out in much the same way as the old words."
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> "The truth is that the precise language of a sedition law is like the inscription on a sword. What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies."
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> *Freedom of Speech* (1941), pp. 466-7.

(4) The Courts below have proscribed all advocacy of the forcible overthrow of the Government if accompanied by an evil intent. As Justice Brandeis pointed out, such construction of the law leads to punishment for "disloyal hearts," not for unlawful conduct.[127] "And, historically, most of the excesses of the English law of treason, prior to the eighteenth century, can be described in terms of a treasonable intent found by inference under the head of compassing the death of the King; men were convicted not on evidence fairly showing that they had planned the King's death and the overthrow of the government, but on the basis of the expression or advocacy of ideas or measures whose 'natural' consequences, as deduced by their political foes, might involve harm to the king or the state." Hurst, *Treason in the United States,* 58 Harv. L. Rev. 226, 815 (1945).

When ideas devoid of incitement to action become punishable because of the supposed wicked intent with which they are delivered, the practice arises to infer the proscribed intent not from acts of the accused, but from the bad tendency of the ideas which he has expressed. ". . ., under the Federalist judges, intent to turn out

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[127] "Marsyas dreamt that he had cut Dionysius' throat. Dionysius put him to death, pretending that he would never have dreamt of such a thing by night, if he had not thought of it by day. This was a most tyrannical action; for though it had been the subject of his thoughts, yet he had made no attempt towards it. The laws do not take upon them to punish any other than overt acts." Montesquieu, *Spirit of Laws* (1873 ed.), vol. I, Book XII, Ch. XI, p. 221.

the party in office was construed into intent to excite seditious acts." Miller, *Crisis in Freedom* (1951), p. 137. Madison stated: "To prohibit the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct." *Report on Virginia Resolutions* in 4 Elliot's Debates (2nd ed.), p. 575. See also, Chafee, *Free Speech* (1920), pp. 25-30.

(5) Finally, a sedition law as broad as the one construed here, may prevent "the discovery of grievances which need removal" and suppress "much good with a little bad." Chafee, *supra* (1941), pp. 187, 188. For, "coupled with such advocacy is criticism of defects in our society . . . Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed . . . we can hardly escape restriction on the interchange of ideas . . . Without open minds there can be no open society. And if society be not open the spirit of man is mutilated and becomes enslaved." Justice Frankfurter in *Dennis v. United States*, 341 U. S. 494, 549, 556.

The protection of ideas we "hate" is, therefore, not merely for the benefit of a minority; in a more significant sense it is the majority who are in danger whenever an idea is suppressed. If an idea is false, it is important for the people to know why it is false. The defense of the "right" without knowing why it is "right" is sheer prejudice and valueless. If it is true, a free society cannot exist without hearing the idea, for truth is the only way of correcting error. If it is partially true and partially false, no progress can be achieved if we bury the truth along with the false. John Stuart Mill, *On Liberty*. It is a truism of history that any revolutionary doctrine has always included ideas of much needed reform, reforms which generally have found their way into the political and social fabric of society. "The only reason for dwelling on all this is that if we are to preserve democracy we must understand its principles. And the principle which distinguishes it from all other forms of government is that in a democracy the opposition not only is tolerated as constitutional but must be maintained because it is in fact indispensable." Walter Lippman, *The Indispensable Opposition* in Commager, Living Ideas in America (1951), p. 402.

Chief Justice Hughes stressed in *De Jonge* that "security of the Republic, the very foundation of constitutional government" depends upon upholding the fundamental rights of free speech, free press and free assembly to the end that "changes, if desired, may be obtained by

peaceful means." He stated this faith for a unanimous Court notwithstanding the alleged "objectives of the Communist Party." It is undoubtedly true, as the Chief Justice suggested, that it is the rare case where violence occurs in effecting social or political changes when democracy is freely extended; it is almost the universal rule that it takes place when freedom is denied. George III equated the doctrine of "no taxation without representation" with "treason"; the War of Independence followed and an empire fell in the New World. Calhoun and the slave owners equated "abolition of slavery" with "incendiary insurrection"; the "irrepressible conflict" was on. The fact is, as history seems to show, that governments, and society, gain security, order and confidence when repressive legislation is foregone.

For all of the aforesaid reasons, it is submitted that the rulings of the courts below should not stand. The expansion of the Smith Act to permit widespread encroachments on basic freedoms runs counter to law and history. In *Dennis*, this Court drew the line between liberty and governmental power at "incitement to action," a principle intended at least to unify the democratic process; it should not countenance so soon thereafter, a principle which would obliterate that line and leave liberty entirely dependent upon the arbitrary exercise of governmental power.

IV.

The Refusal of the Trial Court Either to Itself Rule on the Issue of "Clear and Present Danger" or to Instruct the Jury With Respect to the Pertinent Jury Questions Relating Thereto, Together With the Trial Court's Equation of "Clear and Present Danger" Solely With the Alleged Agreement to Advocate Plus the Alleged Individual "Intent," Resulted in an Unconstitutional Application of the Statute to These Petitioners; and the Trial Court Should Have Directed an Acquittal of the Petitioners Because of the Absence of Any Basis for a Finding of Clear and Present Danger.

In *Dennis* this Court held that the issue of "clear and present danger" was a question of law which the trial court was required to decide upon its evaluation of the evidence, subject to the jury's verdict under proper instructions. The statute could be constitutionally applied, this Court decided, only upon proof beyond a reasonable doubt: (a) that the accused conspired to advocate and teach the forcible overthrow of the Government (341 U. S. at pp. 497-98); (b) by language reasonably and ordinarily calculated to incite persons to such action (341 U. S. at pp. 511-12); (c) with the intent that such advocacy and teaching be of a rule or principle of action (341 U. S. at p. 512); (d) with the power of the accused to bring about an attempted forcible overthrow of the Government (341 U. S. at p. 516); (e) with the accused's activities in their very nature directed to the attainment of the objects of the conspiracy (341 U. S. at p. 516); and (f) all with the specific intent to accomplish the forcible overthrow of the Government as speedily as circumstances would permit (341 U. S. at pp. 499-500).

Only when such findings were "coupled with the inflammable nature of world conditions" (341 U. S. at p. 511) did this Court hold that the statute could be constitutionally applied to the accused. The courts below refused to consider, or to instruct the jury to consider, elements b, c, d and e. Excluded from the case were questions of advocacy, in language of incitement to action, intent that the advocacy be of a rule or principle of action, power to bring about the evil, and the nature of petitioners' activities. Court and jury considered only "conspiracy" and "unlawful intent." This excision of the very heart of the clear and present danger doctrine permitted the conviction of petitioners for the exercise of the freedom of speech which the Constitution guarantees. We turn now to a more detailed consideration of the rulings of the courts below.

A. In dismissing the original indictment, the trial judge held that the "clear danger" is the advocacy of the forcible overthrow of government "with intent to bring about ultimately the overthrow of government by means of force or violence"; that the "present danger" consists in the specific intent of such advocate to accomplish such forcible overthrow "as speedily as possible" (Cert. App. B, p. 64). When the motions for judgments of acquittal were denied, the trial judge in applying the "danger" rule distinguished between an attack upon the constitutional validity of a statute on its face, and an attack upon its particular application. According to the court, the "danger" rule serves "as the standard to be applied in testing the constitutionality on its face of a statute which restrains freedom of expression" (Cert. App. B, p. 135). However, when invoked as in the instant case, to test the constitutionality of the statute as applied, the "danger" rule only "furnishes

the standard whereby to gauge the sufficiency of the evidence as to the state of mind or intent of the accused" (Cert. App. B, p. 135). The court repeated that *any* advocacy and teaching of the forcible overthrow of the Government with intent ultimately to accomplish such overthrow was the "clear danger," and intent to accomplish such overthrow as speedily as possible was the "present danger" (Cert. App. B, pp. 136-7).

Thus the court held that the Smith Act could be constitutionally applied to any conspiracy to advocate and teach the forcible overthrow of the Government if the accused were shown to possess the proscribed state of mind. It refused to consider, or to require the jury to determine, whether the contemplated advocacy and teaching was to be in language of incitement to action or whether any evidence in the record established, objectively, that the petitioners had the power to bring about *unlawful action* or engaged in activities directed to that end. Petitioners urged, on motions for judgments of acquittal, that the evidence of the nature of their activities and of their power to bring about the evil at which the law is aimed was insufficient to support verdicts of guilt [Clk. R. 64, 67]. It was in response to these motions that the trial judge ruled these issues out of the case.[128]

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[128]The trial court could not have made the exclusion more plain. Referring to Chief Justice Vinson's language: "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (341 U. S. 494, 516), the trial judge commented: "This does not mean a thing to me, Mr. Margolis. With all deference, it is not understandable to the lawyer. They are words; they are very kind words and they are all right. I have no quarrel with them at all, *but they do not mean a thing in my view to advance the holding in the case* . . . but we must remember that the justices of the Supreme Court . . . . write a great many words, sometimes that *are not necessary* to the decision" [R. 9680] (emphasis supplied).

Petitioners requested and the Court refused to give an instruction that a finding of power to bring about the evil was essential to verdicts against petitioners [Prop. Inst. 46, R. 13,824-825; App. Item 2(q), pp. 69, 75] and another that the prosecution had burden of establishing "that the nature of the activities of each such defendant had as their objective and purpose the advocacy and teaching of the duties and necessity of the overthrow and destruction of Government of the United States by force and violence" [Prop. Inst. 47, R. 13,825; App. Item 2(q), pp. 69, 76]. The sufficiency of the evidence to establish a conspiracy to use language of incitement was also challenged in the motions for judgments of acquittal [Clk. R. 68], and, as has been noted, instructions on this issue were also requested and refused (*supra*, p. 112).

By these rulings, the court eliminated for both itself and the jury all objective tests demanded by the "clear and present danger rule." Except for the subjective factor of intent an agreement to speak was in and of itself declared criminal without regard to its relationship to unlawful action.

To convert the "danger" rule into a gauge whereby the sufficiency of the evidence as to state of mind or intent of the accused alone is to be measured, is to irrationally equate an objective test with a subjective standard. The Constitution requires that *both* tests be satisfied so that the danger of action which Congress has the authority to prohibit be shown as an objective reality as well from the subjective wish of the accused.

B. Because of the manner in which the trial court here disposed of the question of clear and present danger,

it may be appropriate to examine in detail how differently the question was treated in *Dennis*. Judge Medina instructed the jury that the defendants could not be convicted unless the jury found beyond a reasonable doubt that the accused conspired to advocate and teach in language of incitement to action and as a rule or principle of action with the requisite specific intent. 9 F. R. D. 367, 391. Judge Medina further informed the jury that if they found the defendants guilty of a violation of the statute, as he had interpreted it, then he found a "sufficient danger of a substantive evil that the Congress has a right to prevent." And he added:

> "This is a matter of law about which you have no concern. It is a finding on a matter of law which I deem essential to support *my ruling that the case should be submitted to you* to pass upon the guilt or innocence of the defendants" (*id.*, p. 392). (Emphasis supplied).

In deciding to submit the case to the jury, Judge Medina was required to consider such factual issues as advocacy in language of incitement to action, the nature of the defendants' activities and their power to bring about the evil. Judge Hand, in the Court of Appeals, made this plain when he stated that the trial court's finding of "clear and present danger" was justified, stressing that the defendants were found to be the "controlling spirits" (183 F. 2d 201, 212) in the organization created as the alleged vehicle of the conspiracy; that the conspiracy and unlawful intent of the defendants was established (*id.*, p. 212); that the conspiracy contemplated advocacy and teaching in language of incitement to action (*id.*, p. 212); and that the activities of defendants had been directed toward that end (*id.*, p. 206). All of these facts, coupled

with the then "strains and tensions" of the international situation (*id.*, p. 213), warranted the trial court's finding of sufficient danger, stated Judge Hand. He agreed with Judge Medina that it is not enough "that the purpose of the utterer may include stirring up his hearers to illegal conduct—at least, when the utterance is political" (183 F. 2d 201, 212). In each case, stated Judge Hand, the courts may inquire whether the utterance itself, when "mixed or compounded" with language of incitement to action, is one which the First Amendment does not protect (*id.*, p. 212). ". . . they [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (*id.*, p. 212).

This Court, too, was explicit in *Dennis* that the "clear and present danger" rule was not merely a standard for measuring the state of mind of the accused. Chief Justice Vinson, early in the opinion, stated that the statute required, as an essential element of the crime, proof of a specific criminal intent. 341 U. S. at p. 499. But he went on to say that advocacy of forcible overthrow of Government, "even though coupled with the intent to accomplish that overthrow," contains an element of speech (*id.*, at p. 502), requiring consideration of the clear and present danger principles enunciated by this Court (pp. 503-11). "In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction" (pp. 514-5). To emphasize that the "clear and present danger" test was an objective test dependent upon many factors, and neither the same as nor dependent solely upon proof of a state of mind, Chief Justice Vinson added: "Where there is doubt as to the intent of the

defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution" (p. 516).

After approving Judge Medina's "essential" instruction on incitement to action, this Court placed its greatest emphasis upon the defendants' power to bring about the evil. Chief Justice Vinson noted the findings of the lower court that. *"By virtue of their control* over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party"; that the defendants had allegedly formed within the Party "a highly organized conspiracy, with rigidly disciplined members subject to call *when the leaders, these petitioners, felt that the time had come for action."* 341 U. S. 494, 498, 511 (emphasis supplied). And this Court emphasized, that while the question of clear and present danger is a question of law for the trial court to decide, still it is dependent for its answer upon a proper consideration of all the relevant facts (*id.*, p. 513). Further, this Court admonished that it was not making one general decision on "clear and present danger" for all future Smith Act prosecutions. ". . . the Court must examine judicially the application of the statute to *the particular situation,* to ascertain if the Constitution prohibits the conviction" *(id.*, pp. 514-5) (emphasis supplied).

C. The distinction between subjective intent and evidence of objective facts essential to a finding of clear and present danger is not novel to *Dennis.* In the very case where the clear and present danger rule was first enunciated (*Schenck v. United States,* 249 U. S. 47),

proof of the specific intent was virtually conceded (*id.*, p. 51). Yet Justice Holmes went on to announce the rule, stressing that it relates to "proximity and degree" (*id.*, p. 52). "Proximity" and "degree" are uniformly tests for overt conduct; they are not used as standards relating to a state of mind.

In *Pierce v. United States*, 252 U. S. 239, Justices Holmes and Brandeis agreed that there was not "a particle of evidence" to establish the specific intent (*id.*, p. 271). But they added: "Furthermore, *the nature of the words used* and *the circumstances under which they were used* showed affirmatively that they did not 'create a clear and present danger' that thereby the operations or success of our military and naval forces would be interfered with" (*id.*, p. 271) (emphasis supplied). See, Chafee, *Free Speech in the United States* (1941), pp. 57-60, 186. This Court summed the matter up in *Hartzel v. United States*, 322 U. S. 680, 686-7:

> "The first element is a subjective one, consisting of a specific intent or evil purpose at the time of the alleged overt acts. . . . The second element is an objective one, consisting of a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent. . . . Both elements must be proved by the Government beyond a reasonable doubt."

The "clear and present danger" doctrine, no matter how formulated, should not be permitted to become a device for circumventing the First Amendment and abridging the exercise of freedoms of speech, press and assembly. Congress, under the Constitution, has power to deal with unlawful action. It has no power to proscribe the dis-

cussion or advocacy of ideas. The "clear and present danger" doctrine is a rule of reason whereby a court in a speech case determines from the evidence whether an accused has actually been guilty of speech so proximately and immediately related to unlawful action that the prosecution is directed against the unlawful action rather than against protected speech. The ingredients of the test are all concerned with action. The question always is whether the nature of the words used in the circumstances of their utterance were such as directly to incite to unlawful action; whether the accused was directing his activities towards unlawful action and had the power to bring about a "substantive evil that Congress has a right to prevent" in a setting where such action might reasonably be contemplated. A court which ignores these considerations and construes a law of Congress as applicable to the mere exercise of speech, press and assembly "goes beyond the power to restrict abuses of freedom of speech and arbitrarily denies that freedom." *Herndon v. Lowry,* 301 U. S. 242, 258-9.

There is persuasive evidence that the "clear and present danger" test was derived from the criteria applicable to criminal attempts. Holmes, *The Common Law* (1881), p. 68; Chafee, *Freedom of Speech in War Time,* 32 Harv. L. Rev. 932, 967 (1919); Green, J. R., *Liberty Under The Fourteenth Amendment,* 27 Wash. U. L. Q. 497, 539-40 (1942); Antieu, C. J., *The Rule of Clear and Present Danger—Its Origin and Application,* 13 Univ. of Det. L. J. 198 (1950). Dissenting in *Pierce v. United States,* 252 U. S. 239, 273, Justice Brandeis stated (Justice Holmes concurring): "The fundamental right of free men to strive for better conditions . . . will

not be preserved, if efforts to secure it by argument to fellow citizens may be construed *as criminal incitement to disobey the existing law*" (emphasis supplied). In *Cantwell v. Connecticut*, 310 U. S. 296, 310-11, Justice Roberts, speaking for a unanimous Court, stated: "We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse . . . we think that, in the absence of a statute narrowly drawn to define and punish *specific conduct* as constituting a clear and present danger to a substantial interest of the State, the petitioner's communication, considered in the light of the constitutional guaranties, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question" (emphasis supplied). As recently as *American Communications Association v. Douds*, 339 U. S. 382, 395, Chief Justice Vinson stated: "By this means they [Justices Holmes and Brandeis] sought to convey the philosophy that, under the First Amendment, the public has a right to every man's views and every man the right to speak them. Government may cut him off *only* when his views are no longer merely views but *threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself*" (emphasis supplied).

In *Dennis*, this Court reformulated the "clear and present danger" doctrine, at least for cases relating to evils of great national magnitude, to "clear and probable danger."[8] But, in so holding, this Court recognized that constitutional limitations and guarantees could be maintained under the rule thus enlarged only by insistence

upon the highest standards of proof.[129] This Court stressed that the statute had been interpreted as punishing only advocacy and teaching in language of incitement to action; that if there was doubt as to the intent of the accused, the nature of their activities or their power to bring about "the evil," this Court would review the convictions with the scrupulous care demanded by the Constitution. Absent evidentiary requirements of the strictest character, the "clear and probable" application of the "clear and present" danger rule might serve mainly to camouflage abridgement of speech, press and assembly and, thereby, to increase the possibility of the extension of, rather than acting as a brake upon, the contraction of these freedoms.[130]

The unavoidable responsibility which this Court has assumed to review with scrupulous care the application

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[129]Petitioners submit, that although this case can be decided without reconsidering the clear and present danger rule as defined in *Dennis*, experience demonstrates that the rule thus construed maintains a barrier against punishment for speech all too frail to withstand the assaults on freedom of belief to be expected in times when public feeling runs high and when the protection afforded by the First Amendment for all the people, including particularly minorities is most critically needed. See the comments of the profession: Antieu, C. J., *"Clear and Present Danger"—Its Meaning and Significance*, 25 Notre Dame L. Rev. 603 (1950); *"The Rule of Clear and Present Danger: Scope of Its Applicability,"* 48 Mich. L. Rev. 811 (1950); *The Rule of Clear And Present Danger—Its Origin And Application*, 13 Univ. of Detroit L. J. 198 (1950); *Judicial Delimitation Of The First Amendment Freedoms*, 34 Marquette L. Rev. 57 (1950); Boudin, L., *"Seditious Doctrines" And "The Clear and Present Danger" Rule*, 38 Va. L. Rev. 143, 315 (1952); Nathanson, N. L., *The Communist Trial And The Clear And Present Danger Test*, 63 Harv. L. Rev. 1167 (1950). A second look at this rule as stated in *Dennis* is timely and is essential if our freedoms are to be maintained and expanded rather than weakened and restricted.

[130]This danger is not eliminated as long as the "clear and probable" construction is adhered to, but at least it is somewhat modified by the requirement that the danger be established by hard and trustworthy facts.

of the danger rule in free speech cases, does not minimize the function of the trial court. To the contrary, scrupulous care is also demanded of the trial court in making the initial determination. When the District Court in this case unequivocally declined to adjudge any essential fact except the question of unlawful intent; when it thrust from the case all consideration of questions of "incitement" or "power to bring about the evil" or the "nature" of an accused's activities, the District Court was eliminating from consideration the very issues of fact essential to a determination of the basic constitutional issue. Since these factual issues depend for their resolution upon the oral testimony of witnesses, their credibility, demeanor, etc., on direct and cross, the issues were peculiarly within the province of trial court and jury, a function which the trial court could not delegate to any reviewing court.[131] It is one thing for a trial court to consider all the essential facts and reach a correct result by erroneous reasoning; it is quite another for a trial court to reach a result through misapprehension of the law which leads both Court and jury to adjudicate rights without regard to the resolution of issues indispensable to such adjudication in the light of controlling law.

Here was a grave abandonment of the judicial function. Cf., *Lauf v. E. G. Shinner & Co.*, 303 U. S. 323, 329.

> "The trial provided for is one by judge *and* jury; and the judge may not abdicate his function. If the words were of such a nature and were used under such circumstances that men, judging in calmness,

[131]Of course, where the record is insufficient to establish the requisite danger, as petitioners assert is the situation here, that determination should be made by this Court, regardless of what the trial court has done.

could not reasonably say that they created a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent, then it is the duty of the trial judge to withdraw the case from the consideration of the jury; and if he fails to do so, it is the duty of the appellate court to correct the error."

Justice Brandeis in *Schaefer v. United States*, 251 U. S. 466, 483.

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"In application of such a standard [clear and present danger] courts may strike a wrong balance; they may tolerate 'incitements' which they should forbid; they may repress utterances they should allow; but that is a responsibility that they cannot avoid. Abdication is as much a failure of duty, as indifference is a failure to protect primal rights."

Judge Hand in *United States v. Dennis*, 183 F. 2d 201, 212 (C. A. 2, 1950).

D. Because the record in this case does not reveal a "danger" of unlawful action by any standard, the trial judge should have directed judgments of acquittal, and his failure to do so should be remedied by this Court. An examination of the entire record, as it relates to these petitioners (summarized in the Statement of the Case) permits no other conclusion. Aside from the insufficiency of the evidence to establish any petitioner's specific intent or connection with the conspiracy charged, or even the existence of any conspiracy at all, the record is devoid of evidence of an agreement to use language of incitement to the overthrow of the Government by violence at any time, let alone as speedily as circumstances permit.

To the extent that the powers of these petitioners individually or collectively can be ascertained from this record, they not only fail to establish but they negate any power to set in motion an attempt at violent revolution. Not a single petitioner was shown either to possess the requisite predominance or to have a voice in any body exercising such authority.[132] The respondent's theory must be that every member and officer of the Communist Party has the power to bring about the evil simply by virtue of such officership and membership. For respondent can show, in this record, no special power to command or initiate an attempt at violent overthrow by these petitioners.

The nature of petitioners' activities, as disclosed by the evidence, alone demands reversal and acquittal, unless we are to retrogress to the doctrine of seditious conspiracy which the First Amendment was designed to eradicate from our judicial system. The concept that any criticism of the King encompasses a plot to assassinate him cannot be distinguished from the respondent's theory that any dissent by a Communist is *ipso facto* part of a plot to

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[132]The Court of Appeals dismissed the issue of petitioners' power to bring about the evil as wholly irrelevant to the charge herein [Clk. R. 128]. All that the phrase meant in *Dennis*, stated the court below; was "that the setting in which the defendants there acted was such as to allow the court to conclude that the teachings might have resulted in an attempt at overthrow" [Clk. R. 108]. It is not the "setting" or "world conditions" which essentially determines when a law affecting speech shall be applied in a particular situation. If this were the rule, a large and multifarious body of contemporary public opinion in the United States would be doomed to silence. The question must always be, if First Amendment rights are to be preserved, whether those who agree to advocate ideas in language of incitement to action create such a clear and present danger of unlawful action under all the circumstances as to justify the application of criminal sanctions despite the guaranteed immunities of the First Amendment. It is not the "setting" which creates the danger; it is the power, in the setting, to utilize the speech to bring about the evil action which is the focal point for consideration.

overthrow our Government by violence. It is only this resort to the concepts utilized by autocracy and tyranny, that the nature of petitioners' activities can be said to indicate any danger at any time of an attempt at revolution by violence. If the principles upon which the First Amendment rests are applied to petitioners' activities all of which, no matter how unpopular, fall within the area of lawful political activity, then the record establishes affirmatively petitioners' innnocence rather than the required proof of guilt beyond a reasonable doubt.

E. The error of the courts below in dealing with the danger problem undermines the judicial process and abandons the basic precepts of the First Amendment. The failure of the courts below to perform the judicial function of determining whether danger of unlawful action existed, led directly to convictions for speech alone.

The convictions were sustained on the theory that freedom of speech, press and assembly may constitutionally be suppressed whenever a court deems "international relations" to be strained. If the views below be accepted, the "clear and probable danger" doctrine as enunciated by this Court in *Dennis* will be equated solely with "world conditions," in total disregard of any realistic danger that speech will ignite unlawful action. The exercise of freedom of speech, press and assembly will flow or ebb in proportion to the tide of "international relations." Moreover, the exercise of such rights will become entirely dependent upon the prophecy of judges as to future "world conditions." Our institutions are truly endangered if individuals may be imprisoned, not for anything they say or do which is unlawful, but principally because in the opinion of government officials, future "world conditions" seem to render it wise that speech be suppressed. It is

unreasonable to assume that Congress intended, or could reasonably have concluded, that the Smith Act should be applied to persons who never agreed to advocate in language of incitement to action and who had no power to bring about an attempted forcible overthrow of the Government. Moreover, here, not even a conspiracy to engage in the proscribed advocacy was proven at the trial. The only danger to the nation revealed by the record in this case lies in the standards under the Constitution fixed by the courts below in applying the Smith Act to these petitioners.

V.

The Construction of the Word "Organize" by the Courts Below Was Contrary to Law and the Constitution.

A. As petitioners noted in the Statement of the Case (*supra*, pp. 7-12), the indictment here is unique among all Smith Act indictments because it is the only one which charges that a conspiracy was formed "on or about June 28, 1940" to organize the Communist Party for the purpose of advocating and teaching the forcible overthrow of the Government [Clk. R. 1]. In *Dennis*, and indeed in every other Smith Act prosecution, the stress of respondent has been on the charge that the conspiracy to organize the Communist Party was launched in April 1945. This Court in *Dennis* emphasized the importance of the "1945 conspiracy." "Following the dissolution of the Communist International in 1943, the Communist Party of the United States dissolved and was reconstituted as the Communist Political Association. The program of this Association was one of cooperation between labor and management, and, in general, one designed to

achieve national unity and peace and prosperity in the postwar period" (341 U. S. 494, 498, n. 1). This Court predicated its decision in *Dennis* in a finding that the defendants "By virtue of their control over the political apparatus of the Communist Political Association . . . were able to transform that organization into the Communist Party" in 1945, for the alleged unlawful purposes there set forth.

The indictment in *Dennis* was returned on July 20, 1948 (80 F. Supp. 479, 481). It charged that the conspiracy to organize the Party was formed on or about April, 1945. At the trial, respondent took the position that the Party had been organized on July 28, 1945 [Clk. R. 25-31] and at that time the charged conspiracy of April, 1945, to organize the Party for alleged unlawful purposes was achieved [Clk. R. 9-14]. The prosecution thus was initiated within the three year period of the statute of limitations, measuring the period from the date of organization on July 28, 1945, to the return of the indictment on July 20, 1948.

In this case respondent, abandoning the "1945 conspiracy" theory of its original indictments (*supra*, pp. 7-12), for the first time charged that the conspiracy to organize was formed on June 28, 1940. All efforts prior to trial to ascertain respondent's theory as to when the Communist Party was organized were frustrated by the rulings of the trial court [Clk. R. 6-14, 25-32, 61-2]. At the trial, the respondent, while insisting that the conspiracy charged in the *Dennis* case was identical with the conspiracy charged in the indictment here "excepting in point of time" [R. 1407], proved, as in *Dennis*, that the Communist Party had been dissolved in 1944, the Communist Political Association was then formed, and this was

followed by the dissolution of the Association and the organization of the Communist Party in New York in 1945. There was no proof of any conspiracy to organize the Party in 1940 as alleged in the indictment. The only occurrence on June 28, 1940 of any relevance here was the enactment of the Smith Act (June 28, 1940, c. 439, Title I, Sections 2, 3, 5, 54 Stat, 670, 671).

Respondent's shift in its theory may be explained by the following considerations. In the first place, it had no proof that any of *these petitioners* had any control over the political apparatus of the Association or the Party; it was unable to prove that any of them knew or understood that the organization of the Communist Party of the United States at the convention in New York in 1945 was for the purpose of advocating or teaching the overthrow of the Government by force and violence. In the second place, the respondent made no claim that these petitioners, apart from their relationship with the Communist Party, had conspired to advocate and teach the forcible overthrow of the Government. Like the prosecution in *Dennis,* respondent was compelled to rely on the portion of the charge in the indictment which dealt with organizing the Party for the proscribed purpose. But, unlike *Dennis,* the statute of limitations had obviously run here on the prosecution for organizing the Party in 1945. Therefore, the respondent, in flat contradiction of its position in *Dennis,* maintained here that the Party was not "organized" in July, 1945; that under the Smith Act, any activity within the Party or in its behalf, no matter how minor or innocuous, was "helping to organize" the Party; that a conspiracy to so organize the Party was a continuous one and indeed could never be achieved, but would continue until the Party became extinct.

The trial court fully accepted respondent's theory on this issue. The court instructed the jury:

> "The verb 'organize,' as used in the Smith Act and the indictment, includes the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, party, group or other organization" [Inst. 13, R. 13,756 App. Item 2(g), p. 37].[133]

The question presented here is whether this construction of the statute was correct. The ensuing discussion is intended to demonstrate that such an interpretation of the Smith Act is not only unwarranted in law, but if permitted to stand, raises serious constitutional issues which this Court ordinarily will avoid when a more appropriate and accurately precise construction of the law is available.

B. The question as to the meaning of the word "organize" did not arise in *Dennis* for the reasons aforestated. The question appears neither to have been raised nor considered on appeal in *Frankfeld v. United States*, 198 F. 2d 679 (C.A. 4, 1952). In *Flynn v. United States*, 216 F. 2d 354, 358 (C.A. 2, 1954), the construction of

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[133]In objecting to this instruction, petitioners requested the trial court to instruct the jury as follows: "To 'organize' means 'to furnish with organs, to give an organic structure to.' To organize means to bring into existence and is a very different thing from extending the limits of an organization or adding to or increasing its size" (Prop. Inst. 34, App. Item 2(g), pp. 37-8). Motions to dismiss the indictment [Clk. R. 6, 7] and for judgments of acquittal [Clk. R. 64, 71] upon the grounds that the prosecution was barred by the statute of limitations were made and denied [Clk. R. 61, 100]. The Court of Appeals affirmed all of the rulings of the trial court on this issue [Clk. R. 118-9]. The Court held that even if it be assumed "that the crime of organizing had been complete" [Clk. R. 119], still the charge of conspiracy to advocate and teach remained. We discuss this issue later in this Point.

the statute was directly contrary to the construction here, and the portion of the indictment which charged a conspiracy to organize was held barred by the statute of limitations, Judge Dimock instructing the jury: "The Communist Party was organized back in 1945. Under the Statute of Limitations a defendant cannot be found guilty of any crime committed more than 3 years before the filing of the indictment. The indictment in this case was filed June 20, 1951, so that no defendant can be convicted of conspiring to do anything that was completed before June 20, 1948, and that includes the organization of the Communist Party. Thus, even if you should find beyond a reasonable doubt that a defendant, who had not conspired to teach, had conspired to organize a group to teach, you could not find him guilty because the act of organization of the Communist Party was, as we say, prior to the period of the Statute of Limitations." (*United States v. Flynn*, unreported (S.D. N.Y., 1953; C. 137-7). A similar instruction was given by the trial court in *United States v. Mesarosh*, 223 F. 2d 449. 465 (C.A. 3, 1955). These rulings in Smith Act prosecutions appear consistent with law and the purpose of the statute, as we now demonstrate.

C. If legislative purpose and intent be first considered, it is plain that the construction of the statutes by the courts below was erroneous. The history of the Smith Act and its phraseology indicate that the word "organize" is used in the ordinary sense. There was no discussion in Congress during the pendency of the measure as to the meaning of the term. Apparently it was assumed that the meaning of the word "organize" was obvious and settled. When Congress used a term in any special sense in the Smith Act, a special definition was inserted in the

Act. See the definition of "Government of the United States," 54 Stat. 670, Title I, Section 2(b).

In *Dennis*, Justice Jackson noted (341 U. S. 494, 562, n. 2) that the initial criminal anarchy statutes of 1909 were the prototypes of the criminal syndicalism statutes of 1917-19, essentially the same in language, and that these state statutes served as a model for the Smith Act. See, Chafee, *Free Speech in the United States* (1941), pp. 143, 163, 165.

The language of the California Criminal Syndicalism Act and of the Smith Act are strikingly similar. *Cf.*, Deering's General Laws, Act 8428, Section 2(4) and 18 U. S. C., Section 2385, par. 3. The California decisions interpreting the language of the Criminal Syndicalism statutes in 1923 and 1924 indicate a settled construction of the provisions of those statutes for almost two decades with which Congress was presumably familiar when it adopted similar language in the Smith Act. Thus, in *People v. Thornton*, 63 Cal. App. 724, 219 Pac. 1020 (1923), the indictment charged that defendant, among other things, "did then and there willfully, unlawfully, knowingly, and feloniously organize and assist in organizing said organization known and designated as the 'Industrial Workers of the World,' . . . which said organization . . . was then and there organized to advocate, teach, aid, and abet the commission of criminal syndicalism as a means of accomplishing . . . political changes in the government of the United States." The evidence showed that the defendant had recruited a member into the organization. The Court held that the evidence was insufficient to justify a conviction of defendant "of the crime of willfully or at all organizing or assisting in organizing the said I. W. W." (p. 726). "The society

was completely organized and in existence at and prior to that time" (p. 726). In *People v. Thurman*, 62 Cal. App. 147, 216 Pac. 394 (1923), the information again included a charge of "organizing and assisting in organizing" the I. W. W. The Court in that case held that neither the circulation nor distribution of the literature of the I. W. W. nor recruitment, if there had been any, of members constituted "organizing or assisting in organizing" under the law (p. 151). The Court held that the word "organize" as contained in the statute and as used in common parlance had no doubtful or ambiguous meaning. "To organize is a very different thing from extending the limits of the organization or adding to or increasing its size" (p. 151). "To organize means 'to form with suitable organs'" (p. 151). In *People v. Ware*, 67 Cal. App. 81, 226 Pac. 956 (1924), the words "organize and assist in organizing" were for a third time held not to include the recruitment of new members. "That society (I. W. W.) was completely organized and in existence before appellants had anything to do with it. And the act of bringing in or assisting to bring in members is not the equivalent of 'organizing or assisting in organizing' such a group of persons" (p. 84).

Ordinarily it will be presumed that a legislature which adopts the wording of a statute from another legislative jurisdiction carries with it the previous judicial interpretations of the wording. Such a presumption of legislative intention is especially strong where the similarity in language is marked, where the character of the decisions in the jurisdictions from which the language was adopted is well established, and there is no evidence to indicate a contrary intention. *Willis v. Eastern Trust & Banking Co.*, 169 U. S. 295, 304-8; *James v. Appel*,

192 U. S. 129, 135; *Joines v. Patterson*, 274 U. S. 544, 549.

D. In the absence of some contrary indication, courts must assume that the framers of the statute intended to convey the ordinary meaning which is attached to the language they used. *Jones v. Liberty Glass Co.*, 332 U. S. 524, 531; *Rosenman v. United States*, 323 U. S. 658, 661. "As a general rule words do not acquire a peculiar and different meaning when used in a statute. Ordinarily they are to be given their usual, natural, plain, ordinary, and commonly understood meaning, and strict grammatical usage will not necessarily control over the general and popular usage of the words." 82 C. J. S., "Statutes," Sec. 329(b), p. 629. "For the purpose of either limiting or extending the operation of the statute, the words therein are not to be given a forced, strained, subtle or unusual meaning." 82 C. J. S., *supra*, p. 649. See also *Lindstrom v. Commissioner*, 149 F. 2d 344, 346 (C.A. 9, 1945); *Cliffs Corp. v. United States*, 103 F. 2d 77, 80 (C.A. 6, 1939).

The meaning commonly attributed to the word "organize" is to bring an organization into existence and to furnish it with organs so that it is endowed with capacity to exercise its appropriate functions. Indeed, it is usually defined by excluding any notion that the word "organize" comprises extension of the limits of the organization or adding to or increasing its size. The commonly accepted definition is pervasive in cases involving unincorporated as well as incorporated associations.

Thus, in *People v. Thurman*, *supra*, the Court stated: "Such increase of membership would not alone have sufficed to furnish the body of men known as the Industrial

Workers of the World with organs—a president, secretary, treasurer, etc.—whereby it would be endowed with the capacity to function—particuarly if it were already endowed with such functioning organ or media through which its purposes might be accomplished and its acts performed" (p. 153). In *People v. Thornton, supra,* the Court held that "to organize is a very different thing from extending the limits of the organization or adding to or increasing its size" (p. 727). In *State ex rel. Childs v. School District,* 54 Minn. 213, 55 N. W. 1122 (1893), the Court stated (p. 215): "The words 'establish,' 'create,' 'form,' and 'organize' are evidently used interchangeably, and as practically synonymous. The word 'organization' is clearly used in the sense of formation, and includes everything necessary to the creation of the district, or bringing it into being." In *Whitmire v. Cass,* 213 S. C. 230, 236, 49 S. E. 2d 1 (1948), the Court stated: "The word 'organize' in some of its forms is frequently used in the Constitution and laws of the state, and as so used has no doubtful or ambiguous meaning. To organize a certain territory into a municipal corporation is a very different thing from that of extending the limits of an incorporated city over new territory." Similar language is contained in *Warren v. Barber Asphalt Pav. Co.,* 115 Mo. 572, 22 S. W. 490, 491 (1893). In *Commonwealth v. Mann Co.,* 150 Pa. 64, 70, 24 Atl. 601 (1892), a corporation was held to be "organized when these officers have been appointed and taken upon themselves the burden of their offices; it is then furnished with organs; endowed with the capacity for the functions of life: Webster; qualified for the exercise of its appropriate functions: A. & E. Ency. of Law." Webster's New International Dictionary (2d Ed.) defines the word "organize" as

follows: "1. To furnish with organs; to give an organic structure to. See Organized. 2. To arrange or constitute in interdependent parts, each having a special function, act, office, or relation with respect to the whole; to systematize; to get into working order; as, to *organize* an army; to *organize* recruits." Black's Law Dictionary (3rd Ed., 1944) defines the term in this manner: "To establish or furnish with organs; to systematize; to put into working order; to arrange in order for the normal exercise of its appropriate functions."

The definition given by the trial court is clearly not the ordinarily accepted meaning of the word "organize." It is a strained and artificial definition which ascribes to the word organize the inclusion of such meanings as "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other units of any society, group or other organization." If Congress had intended to give such special meaning to the words, it would have done so. The very omission to give such definition, and the complete absence of legislative discussion with respect thereto, is cogent evidence that Congress expected the word "organize" to have its ordinary accepted meaning. "If Congress intended geographic adjectives to have a structural connotation or to have other than their ordinarily accepted meaning, it would and should have given them a special meaning by definition." *N. L. R. B. v. Highland Park Mfg. Co.*, 341 U. S. 322, 324-5. "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation . . . When the language is plain, we have no right to insert words and phrases, so as to incorporate in

the statute a new and distinct provision." *United States v. Temple*, 105 U. S. 97, 99.

E. The Smith Act is a criminal statute and must be strictly construed. That means that no offense may be created except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses. *United States v. Resnick*, 299 U. S. 207, 209; *United States v. Halseth*, 342 U. S. 277, 280. "Hence, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used." 50 Am. Jur., "Statutes," Sec. 409, p. 433; Sutherland, Statutes and Statutory Construction (3rd Ed., 1943), Secs. 5604-5.

The construction of the statute by the courts below was neither a strict nor fair construction of the language used in the Act. Under the court definition, a jury could arbitrarily find a person guilty of the substantive offense of "organizing or helping to organize" a proscribed organization (10 years imprisonment), or, conspiring to commit such offense (five years) merely upon a showing that a decade after the formation and creation of the organization, such a person brought a single member into the organization, or suggested that a club of three members be abandoned, or merged with another club of two members. Since the trial court did not purport to give an all inclusive or limited definition, the jury was left free to speculate that almost any innocuous activity was "helping to organize, or to organize" the Communist Party of the United States of America. In complete disregard of the internal structure of the statute, a jury could find that one who joined a proscribed organization, as well as one who recruited a member, was "helping to

organize" the organization, although Congress made the act of joining or affiliating with unlawful knowledge a separate offense. 18 U. S. C., Section 2385, par. 3. Indeed, under the trial court's unduly extended construction of this penal law, virtually every separate provision of the statute would be encompassed under the words "organize or help to organize." Such a construction was neither "strict" nor "fair" nor "clear." What the courts below did here was to create a new offense under the guise of construing the statute. "There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States,* 272 U. S. 620, 629.

F. Once the construction given by the courts below is accepted, grave questions of the constitutionality of the statute are raised. If "organize" means something other than to bring into existence; if it "includes," but is not limited to, "the recruiting of new members and the forming of new units, and the regrouping or expansion of existing clubs, classes and other 'units,'" then the provisions of the law become so vague and indefinite, as to fail to give fair notice of what acts will be punished. The trial judge instructed the jury that the verb "organize" *included* the recruitment of new members, the forming of new units, etc., but he gave no indication to the jury as to the limits of the definition. Under such limitless and boundless definition, the jury was left free to speculate that virtually any passive or active relationship with the Party was an act of "organizing" or "helping to organize" the Party. The law, as so construed, provides no ascertainable standards of conduct and petitioners' rights under procedural due process were violated. "Legislation may run afoul of the Due Process Clause because it fails to

give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser v. Utah*, 333 U. S. 95, 97. See also, *United States v. Cardiff*, 344 U. S. 174, 176. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."

Moreover, and most importantly, the construction of the statute by the courts below raises serious questions involving First Amendment rights. Under that construction, virtually any exercise of freedom of speech, press or assembly by a member of the Communist Party could be deemed an act of "organizing" or "helping to organize" the Communist Party of the United States. Even the recruitment of a single member into the Party solely for the purpose of fighting for the Bill of Rights, to extend democracy or to oppose discrimination would come within the interdiction of the statute. This Court has held on numerous occasions that a statute which sweeps within its ambit activities which constitute an exercise of freedom of speech, press or assembly cannot be sustained; that such a statute hangs as a threat to free speech and permits the punishment of the use of such speech; that by its very existence such a statute exists as a pervasive censor and is incompatible with the First Amendment. *Thornhill v. Alabama*, 310 U. S. 88; *Carlson v. Cali-*

fornia, 310 U. S. 106; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Winters v. New York*, 333 U. S. 507; *Burstyn, Inc. v. Wilson*, 343 U. S. 495.

It is fundamental that if a statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is the plain duty of the courts to adopt that construction which will save the statute from constitutional infirmity. *United States v. C. I. O.*, 335 U. S. 106, 121. Such a duty is especially manifest when the plain intent of Congress in the adoption of the provisions of the statutes is that the words contained therein should be given their ordinary and accepted meaning, a construction which at the same time avoids serious legal and constitutional questions.

G. The rulings of the courts below were manifestly harmful to petitioners. In the first place, by asserting that the conspiracy to organize the Communist Party was formed on or about June 28, 1940, respondent on this theory, adopted by the trial court, was able to introdute into evidence a vast conglomeration of hearsay evidence as the declarations of "co-conspirators" made during the existence of the alleged "1940 conspiracy" (Cert. App. B, pp. 106-122). Statements made by individual petitioners, or in their preser.e, but not in the presence of others after 1940 were admitted generally against all petitioners on the theory that they were the statements of co-conspirators made during the course of the 1940 conspiracy and binding on all petitioners (Cert. App. B,

p. 108). Thus, considerable oral and documentary hearsay evidence was admitted involving the period between 1940 and 1945 which would have been inadmissible if the alleged conspiracy to organize was treated as having been formed in 1945. See, *Kotteakos v. United States*, 328 U. S. 750, 765.

In the second place, if the courts below erred in their construction of the word "organize," so much of the prosecution as charged a conspiracy to organize the Communist Party of the United States of America was barred by the statute of limitations. The respondent will undoubtedly concede that if petitioners are correct in their definition, the Communist Party of the United States of America was organized more than three years prior to the return of the indictment herein. Since under the general verdict, the jury may have convicted petitioners for conspiring to "organize," even if they found no conspiracy to "advocate and teach," the prejudice resulting from the trial court's error requires reversal. *Yiswick v. United States*, 329 U. S. 211, 215-20. See also *Stromberg v. California*, 283 U. S. 359, 369-70; *Williams v. North Carolina*, 317 U. S. 287, 292; *Cramer v. United States*, 325 U. S. 1, 36, n. 45.

Finally, since there was no proof of a conspiracy to advocate and teach the forcible overthrow of the Government, and since the alleged conspiracy to organize the Communist Party for such purpose, even assuming the existence of evidence in support thereof, was barred by the statute of limitations, the motions for judgments of acquittal made on behalf of each of the petitioners should have been granted.

VI.

Refusals to Grant Motions for Mistrial Upon Publication of the "F.B.I. Report," and to Grant Motions for Continuance Upon Publication of "the Philbrick Story," Deprived Petitioners of a Fair and Impartial Trial and Their Liberties Without Due Process of Law.

A. The Director of the Federal Bureau of Investigation, a nationally prominent figure highly placed in the Department of Justice, knowingly and intentionally delivered a report for public consumption which purported to determine the very issues which the jury in this case was about to consider (*supra*, pp. 107-111). These issues, it should be noted, were drawn between the parties as the result of a prosecution initiated and pursued by the Department of Justice.[184]

Whether the "principles of Marxism-Leninism," referred to in the Constitution of the Communist Party, espoused the teaching and advocacy of the overthrow of the Government by force and violence was a basic question in the trial of the case, made so particularly by respondent's "inference upon inference" theory. The trial court constantly admitted Marxist-Leninist writings and other evidence offered by respondent upon the ground

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[184]The Department of Justice is an agency in the executive department of government headed by the Attorney General. 5 U. S. C., Section 291. The Attorney General supervises all litigation to which the United States is a party and directs all United States Attorneys in the discharge of their respective duties. 28 U. S. C., Section 507. He is authorized to appoint all officials for the detection and prosecution of crimes against the United States. 5 U. S. C., Section 300. The Federal Bureau of Investigation is a division of the Department of Justice, headed by a director, with powers delineated by law for the detection of crimes against the United States. 5 U. S. C., Section 340; 18 U. S. C., Section 3052; 18 U. S. C., Section 3107.

that it was relevant to the determination of "the nature and character and aims and objectives of the Communist Party" (106 F. Supp. 892, 900, Cert. App. B, pp. 102, 107; 106 F. Supp. 906, 937, Cert. App. B, pp. 128, 134). The jury was so instructed [Inst. 14-G, R. 13,762-63, App. Item 2(k), pp. 47-8]. All of the contentions made by respondent with respect to Marxist-Leninist writings, the aims and objectives of the Communist Party and the imputed inferences drawn therefrom were vigorously contested at the trial.

In this context, at the very eve of the submission of the issues to the jury, the Director of the Federal Bureau of Investigation issued the "Report." It will hardly be denied that the Director knew at the time that the trial herein was in progress, and indeed two members of the F.B.I. sat at respondent's counsel table throughout the trial. The Director had been asked by the Chairman of a Congressional committee for "documentary proof which I could cause to be published" (App. Item 78, p. 302). The Director replied in writing, acknowledging the Chairman's "interest in compiling for general distribution information reflecting documentary proof that the Communist Party in the United States is dedicated to the overthrow of the Government of the United States by force and violence" (*id.*, p. 302). The Director added that "there will be no objection to your committee issuing this compilation" (*id.*, p. 303). No request was made to forbear issuance of the Report until the conclusion of the trial.

Thus the issuance of the Report was intended for public information, and, as was to be expected, received the broadest press, television and radio coverage. No literate person, and indeed no member of this jury in

Los Angeles, could escape seeing, hearing or reading about the "highly confidential" and "long secret" report of the F.B.I.; or that the Director of the Federal Bureau of Investigation had "Documentary Proof that the Communist Party, U.S.A. Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence"; or that the Communists "try by means of cunningly phrased arguments and allegations to disavow their advocacy of overthrow of government by force and violence"; or that "the *principles, the laws,* of Marxism are universally applicable and essentially unchanged. The differences in application are only matters of *detail.* The question of force and violence is hardly a matter of *detail.*" See, Statement of the Case, *supra,* pp. 107-111, for other conclusions contained in the Report, and the Report (App. Item 78, pp. 301-6).

That the material issued was inflammatory and highly prejudicial was neither denied by respondent, nor the courts below. The trial court stated: "It is regrettable that the report was released for publication at an unfortunate time from the standpoint of all concerned with this trial" (Cert. App. B, p. 143). The Court of Appeals stated: "With the trial court, we believe, to say the least the incidents were extremely regrettable in the public interest" [Clk. R. 134].

We have, therefore, a case where the prosecution in a criminal cause, undertook in a highly publicized "long secret" document, to discuss the merits of the case on trial with respect to some of the chief questions of fact in the trial, and to urge by alleged facts and argument that the issues could in their opinion be decided in only one way by the jury. There is no denial of the genuineness or the accuracy of the "Report," and it would ignore

reality to say that the jury did not read the publicity concerning the Report and its contents (*supra*, pp. 107-111). "It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it." *Meyer v. Cadwalader*, 49 Fed. 32, 36 (C.C. E.D. Pa., 1891).

The timing of the publications was calculated to secure the maximum prejudicial effect. It immediately followed the conclusion of petitioners' closing argument to the jury. Petitioners had already said their last word. Only the prosecution's final argument and the court's instructions remained prior to submission of the case to the jury. Not only was this last minute "evidence" presented without opportunity for cross-examination, but actually no means whatsoever were left to petitioners to attempt to offset the prejudicial impact of the "Report."

The question that remains is the validity of the refusal of the courts below to grant petitioners a mistrial after timely and appropriate motions had been made [R. 13,528, 13,535; Ex. NG, R. 13,647; Ex. NF, R. 13,645-47].

As a matter of policy in the administration of criminal justice, it has been held on particular occasions that prejudice must be conclusively presumed where irregularity has tainted the panel with obvious intimidation or coer-

cion. *Moore v. Dempsey*, 261 U. S. 86, 91; *Delaney v. United States*, 199 F. 2d 107, 112-14 (C.A. 1, 1952); *United States v. Marine*, 84 F. Supp. 785 (D.C. Del., 1949); *Meyer v. Cadwalader*, 49 Fed. 32 (C.C. E.D. Pa., 1891). Such a case is actually presented here, for the respondent, through one of its most prominent law-enforcement officials, deliberately communicated with the jury through the press, radio and television in lurid fashion and expressly avowed that some of the most significant evidence at the trial was capable of only one construction, that the Communist Party and its members could not be believed on their disavowal of force and violence, and that all of this was now revealed for the first time in a "long secret F.B.I. Report." It is impossible to assume that any juror affected by the attendant publicity which followed this Report could exclude from his mental processes in reaching his verdict the influence of this pervasive publicity engendered by the Director of the Federal Bureau of Investigation. Under such circumstances, it was impossible to assure the petitioners a fair trial before an impartial jury. See, *Shepherd v. Florida*, 341 U. S. 50, 51; Note, *Controlling Press and Radio Influence in Trials*, 63 Harv. L. Rev. 840 (1950). See also, *Maryland v. Baltimore Radio Show*, 338 U. S. 912; *Berger v. United States*, 295 U. S. 78, 88; *United States v. Rosenberg*, 200 F. 2d 666, 669-70 (C.A. 2, 1952); *Boyer v. United States*, 132 F. 2d 12, 13 (App. D.C., 1942); *Kirsch v. United States*, 174 F. 2d 595, 601 (C.A. 8, 1949); Barron, *Federal Practice and Procedure* (Rules Ed.), Vol. 4, p. 480.

At the very least, the communication of the Report and the publicity thereon, was presumptively prejudicial. "In a criminal case, any private communication, contact,

or tampering, *directly or indirectly*, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. . . ." *Remmer v. United States*, 347 U. S. 227, 229 (emphasis supplied). "Private communications, possibly prejudicial; between jurors and third persons, or witnesses, or the officers in charge, are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox v. United States*, 146 U. S. 140, 150. See also, *Wheaton v. United States*, 133 F. 2d 522 (C.A. 8, 1943); *Griffin v. United States*, 295 Fed. 437 (C.A. 3, 1924).

This Court stated in *Remmer* that when such communication to the jury is proved, "the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant" (*id.*, p. 229). No such hearing was granted to petitioners and no such burden was assumed by respondent. All that the trial court would agree to do in the premises was to propound a single compound question to the jury. "There will be only one question" [R. 13,714]. The compound inquiry merely sought answer as to whether the jury had read the publicity *and*, then, if "they feel they could not with an open mind decide this case solely upon the evidence adduced here as they are duty-bound and oath-bound to do, *and that is all. Then we take their word for it, whatever it is*" [R. 13,714] (emphasis supplied). It should be noted that a negative answer to this single compound question would not clearly indicate whether the jurors had not read the publicity, or whether having read it, they asserted that they would decide the case solely on the evidence, totally unaffected by the "Report." More-

over, the compound question did not purport to ascertain to what extent the publicity on the "F.B.I. Report" had influenced the minds of the jurors; it sought only an answer to the routine question as to whether the jurors believed they could disregard the impact of the "Report" and decide the case on the evidence as they were "duty-bound and oath-bound to do." The single compound question was so phrased that an affirmative answer virtually required an admission by the juror that he would violate his sworn duty. The question was designed to gloss over the incident, not to ferret out what prejudice might result to petitioners therefrom. Not only did the trial court reject any searching interrogation or hearing when the motions were made, but after verdict it ordered no inquiry or interrogation whatever of any juror by anyone under threat of contempt, thus closing the door before and after the verdict to any ascertainment of the effect of the communication upon the jury.

In *Remmer*, this Court stated: "A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. . . . The trial court . . . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate" (*id.*, pp. 229-30). Here the very opposite was done. No hearing of any kind was granted. It is submitted that the trial court thus committed serious prejudicial error and deprived petitioners of a fair and impartial trial without due process of law.

Even when jurors have upon proper examination stated in their opinion that a communication did not influence their verdict, that is not an end of the matter. "All persons are influenced in some way in arriving at deci-

sions and it is difficult, if not impossible, to know just what particular fact or event influences one in arriving at a conclusion." *United States v. Rakes,* 74 F. Supp. 645, 648 (D.C. E.D. Va., 1947). The duty of the trial judge is to permit a thorough and complete examination by all the interested parties. Much more is involved than even the opinion of the juror. Communications such as the ones which took place here imperil "the fairness of the trial" and tend "to undermine the confidence of the community and of the parties in the trial process. . . . A trial judge should not hesitate to grant a new trial where there is any significant doubt whether the presumption of prejudice has been overcome." *Ryan v. United States,* 191 F. 2d 779, 781 (App. D.C., 1951). All of these considerations would have played a part in the final determination of petitioners' motions for mistrial if the trial court had conducted the requisite hearing. Since this was not done, there was a plain abuse of judicial discretion and a deprivation of petitioners' rights to a fair trial.

B. The publication of "The Philbrick Story" just prior to the commencement of the trial, and during its early stages, did not consist merely of sensational news headlines. It was aimed directly at the petitioners here and the issues then about to be tried before the jury. Philbrick was described as one whose "electrifying testimony before Judge Howard Medina is generally conceded to have been instrumental in the conviction of the notorious "Communist 11'" (Statement of the Case, *supra,* p. 106). The so-called "Communist 11" were named *in this indictment* as co-conspirators with petitioners. The publication announced that Philbrick's story would run in serial form and reveal "how the Communists intend

to overthrow the U. S. government and when." From January 20, 1952, through February 7, 1952, both preceding and following the commencement of the trial, the community from which the jury was selected read the testimony of a witness as if he were at the trial, testifying to "when the Reds will strike," "exposure of the Communist Plot," "Ruthless Underground Red Tactics," etc., etc. *(supra,* p. 106). Despite all this, the trial court refused to grant a continuance of the trial until 60 days after the conclusion of the publication of the "Philbrick Story" *(supra,* p. 107).

The trial court was charged with the duty of assuring the petitioners a fair trial, and the refusal to postpone the trial until by a reasonable lapse of time the danger of the prejudice created by these publications may have been substantially removed was clearly erroneous. If the prosecutor at the trial had told the jury that it had a witness who had been instrumental in the conviction of the "notorious 'Communist 11'," who would expose the "Communist Plot," and soon—and had then failed to produce such a witness for examination—undoubtedly a mistrial would have been granted. Here, the same effect was achieved through the newspapers, with petitioners deprived of the right to confront the witness and to cross-examine him. There was simply no way in which petitioners could dissipate the prejudicial harm caused by these publications. The only recourse consistent with fairness to petitioners was a reasonable continuance. *Delaney v. United States,* 199 F. 2d 107 (C.A. 1, 1952). Cf., *Shepherd v. Florida,* 341 U. S. 50.

In *Delaney, supra,* where reversal followed because of failure to grant a continuance under somewhat similar circumstances, the Court stated: "One cannot assume that

the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconception as to probable guilt, engendered by a pervasive pre-trial publicity" (*id.*, pp. 112-3). The Court held that it was not enough that the usual cautionary instructions had been given to the jury. "The naive assumption that prejudicial effects can be overcome by instructions to the jury, . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States,* 336 U. S. 440, 453. "The danger presented by any publication is that whether or not true or reliable, it may improperly influence the honest and rational exercise of judgment by both the triers of fact and law, in the face of judicial procedure designed to protect that judgment. . . . In view of the traditional concern for protecting the rights of an accused in a criminal case, a particular publication would ordinarily be viewed as capable of more serious harm in that type of action than in a civil suit." Note, *Controlling Press and Radio Influence on Trials,* 63 Harv. L. Rev, 840, 841-2 (1950).

It is submitted that both in the failure to grant the requested continuance, and the motion for mistrial upon publication of the "F.B.I. Report," the trial court committed serious error which deprived petitioners of the fair trial guaranteed to them by the Constitution.

Conclusion.

The judgment of the court below should be reversed and the cause remanded to the District Court with directions to enter an order granting the motions for judgments of acquittal made on behalf of each of the petitioners.

Respectfully submitted,

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APPENDIX.

Statutes and Constitutional Provisions Involved.

18 U. S. C. (1946 ed.), Section 10.

"(a) It shall be unlawful for any person—

"(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force and violence, or by the assassination of any officer of any such government:

"(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

"(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof."

18 U. S. C. (1946 ed.), Section 11.

"It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited by the provisions of sections 9-13 of this title."

18 U. S. C. (1948 ed.), Section 2385.

"Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or pro-

priety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

"Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

"Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. . . ."

18 U. S. C. (1948 ed.), Section 371.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

First Amendment.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.